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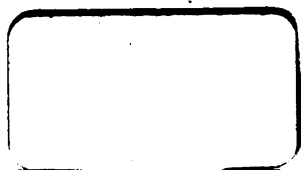
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REPORTS OF CASES

ARGUED AND DETERMINED

IN

2d Ed.
The Court of King's Bench,

IN

MICHAELMAS, HILARY AND EASTER TERMS,

IN THE THIRD YEAR OF WILLIAM IV.

BY

SANDFORD NEVILE, Esq. OF THE INNER TEMPLE,

AND

WILLIAM M. MANNING, Esq. OF LINCOLN'S INN,

BARRISTERS AT LAW.

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J U D G E S
OF THE
C O U R T O F K I N G ' S B E N C H ,

During the period comprised in this volume.

CHARLES LORD TENTERDEN, C. J.

Succeeded by
Sir THOMAS DENMAN, Knt.

Sir JOSEPH LITTLEDALE, Knt.

Sir JAMES PARKE, Knt.

Sir WILLIAM ELIAS TAUNTON, Knt.

Sir JOHN PATTESON, Knt.

N.B. LITTLEDALE, J. sat in the Bail Court in Michaelmas Term; PARKE, J. in Hilary Term; and PATTESON, J. (TAUNTON, J. being indisposed,) in Easter Term.

ATTORNEYS-GENERAL.

Sir THOMAS DENMAN, Knt.

Sir WILLIAM HORNE, Knt.

SOLICITORS-GENERAL.

Sir WILLIAM HORNE, Knt.

Sir JOHN CAMPBELL, Knt.

CASES REPORTED

IN THE FIRST VOLUME.

	<i>Page</i>		<i>Page</i>
		C.	
A.		Bunney v. Poyntz . . .	229
ADAMES, Rex v. . . .	662	Burn, Carvalho v. . . .	700
Aliken v. Howell	191	Burt, Kemp v.	262
Allely, Hine v.	433	Burton v. Haworth . . .	318
Allen, Apothecaries' Comp. v. .	413	Bussey v. Storey	639
Allport, Bingham v.	398	Butcher v. Harrison . . .	677
Apothecaries' Comp. v. Allen	413		
— v. Collins	401		
Arden v. Tucker	759	Carew v. Edwards	632
Arkwright, Doe v.	731	Carmarthen, Justices of, R. v.	368
Attwood, Rex v.	286	Carvalho v. Burn	700
		Castledine v. Mundy . . .	635
B.		Carwardine, Williams v. . .	418
Barker, Wilson v.	409	Chauvel v. Chimelli . . .	731
Barkworth, Marshall v. . . .	279	Clark v. Powell	492
Barron v. Husband	728	Clarke v. Fell	244
Bartolozzi, Howard v.	69	— v. Imperial Gas Light	
Batley, Shaw v.	751	Company	206
Battine, In re	579	—, Sturch v.	671
Baxter v. Taylor	11	Clixby, Rex v. Inhabitants of	118
Belshaw v. Marshall	689	Colebrooke, Bart., v. Layton	374
Bingham v. Allport	398	Collins, Apothec. Comp. v. .	401
Birch v. Freeman	420	Cording, Rex v.	35
Bird v. Boulter	313	Coningsby, Rex v.	199
— v. Relfe	415	Cooper, Doe dem. v. Finch	130
Bishop, Lamey v.	332	Crossfield v. Stanley . . .	668
Blackhurst, Thompson v. . . .	267		
Blofield v. Payne	353	D.	
Boddington v. Schlencker . . .	540	Davey, Roberts v.	445
Bolton v. Dugdale	412	Davies, Doe dem., Jones v.	654
Bonner, Gent., In re	555	Dean v. James	392
Boulter, Bird v.	313	Dickenson v. Naule	721
Brindley, Doe d. Rankin v. . .	1	Digby v. Thompson	485
Brittlebank, Tomlinson v. . . .	455	Doe d. Baggaley v. Hares .	237
Britten, Sims v.	594	— Cooper v. Finch	130
Broxtowe, Inhabitants of,		— Dalton v. Jones	6
Duke of Newcastle v.	601	— Deardon v. Maden	533
Bulwer v. Horne	117	— Hawthorn v. Mee	424
		— Hickman v. Hickman	598

	<i>Page</i>		<i>Page</i>
Rex v. Rickinghall-Superior, Inhabitants of . . .	47	Stanley, Crossfield v. . .	668
— v. Rolfe	773	Stearn v. Mills	436
— v. St. Catherine's Dock Company	121	Stevens, Rubery v.	182
— v. St. Helen's, Auckland, Inhabitants of . . .	462	Storey v. Bussey	639
— v. Smithson	775	Story, Ogle v.	474
— v. Snowdon	459	Stothert v. Goodfellow . .	202
— v. Somerset, Justices of	252	Stovin v. Taylor	250
— v. Tadcaster, Inhab. of	466	Strickwood, Kirk v.	275
— v. Threlkeld, Inhab. of	14	Sturch v. Clarke	671
— v. Tremayne	194	Swann, Woodbridge v. . . .	724
— v. Woodbridge, Inhab. of	457	Sweeney, Saville v.	254
— v. Wroxton, Inhab. of .	712		
— v. West Riding of York- shire, Justices of . .	426	T.	
— v. York, Justices of . .	108	Tadcaster, Inhab. of, Rex v.	466
Richardson v. Watson . .	567	Taylor, Baxter v.	11
Rickinghall Superior, Inhabi- tants of, Rex v.	47	— Stovin v.	250
Rigby, ex parte	593	Terrell, Moore v.	559
Roberts v. Davey	443	Thompson v. Blackhurst .	267
Rolfe, Rex v.	773	— Digby v.	485
Roots v. Lord Dormer . .	667	Threlkeld, Rex v. Inhab. of .	14
Rowe v. Shilson	734	Tomlinson v. Brittlebank .	455
Rubery v. Stevens	182	Tremayne, Rex v.	194
		Tucker, Arden v.	759
		— v. Tucker	477
		V.	
		Vaux v. Vollans	307
		W.	
S.		Wagstaff v. Wilson	4
St. Catherine's Dock Com- pany, Rex v.	121	Wardle v. Nicholson	355
St. Helen's, Auckland, Inha- bitants of, Rex v. . . .	462	Watson, Richardson v. . . .	567
Sanctuary, Godson v. . . .	52	Williams v. Carwardine . .	418
Sandys, ex parte	591	Willmott v. Elkington . . .	749
Sansom, Heath v.	104	Wills and wife, Nurse v. . .	765
Saville v. Sweeney	254	Wilson v. Barker	409
Schlencker, Boddington v. .	540	— v. Hirst	742
Shaw v. Batley	751	— Wagstaff v.	4
Shilson, Rowe v.	734	Wood, Phillips v.	434
Sims v. Britten	594	Woodbridge v. Swann . . .	724
Smith v. Goodwin	371	— Rex v. Inhab. of	457
— Meager v.	449	Wray v. Earl of Egremont .	188
Smithson, Rex v.	775	Wroxton, Inhab. of, Rex v.	712
Snowball v. Goodriche, Bart.	235		
Snowdon, Rex v.	459	Y.	
Soden, Empson v.	720	Youells, Everett v.	530
Somerset, Justices of, Rex v.	252	York, Justices of, Rex v. .	108
		Yorkshire, Justices of West Riding of, Rex v.	426

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

MICHAELMAS TERM,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

DOE d. RANKIN v. BRINDLEY.

EJECTMENT brought for the recovery of certain oil mills at Rochester. The demise in the declaration was laid on the 27th of January, 1832. At the trial before Lord *Tenterden*, C. J., at the summer assizes for the county of Kent, it appeared that in a lease dated 29th September, 1830, the lessor of the plaintiff demised the premises in question to the defendant, who covenanted to repair generally, and to insure against fire, with a proviso that if the oil mills should not be repaired within three months next after notice in writing to that effect from *Rankin*, the lessor, and in case of breach of any of the covenants in the lease, it should be lawful for the lessor to re-enter, &c. On the 6th of January, 1832, a notice to repair within three months from the date was given by the lessor. On the 10th of the

defence at nisi prius that the declaration was irregularly served; as where it was served after the term, in a case not within 1 *Will.* 4, c. 70, s. 36.

B

1832.

A right of re-entry acquired by an omission to repair three months after notice, is suspended but not waived by an agreement to allow the tenant further time to repair. Nor is it waived by the acceptance of rent accruing due before the expiration of the three months.

In ejectment, it is no

1832.

DOE
v.

BRINDLEY.

same month the defendant was served with a declaration in ejectment. An order was obtained for the delivery of the particulars of the breaches of covenant in respect of which the ejectment was brought. The lessor of the plaintiff stated two breaches: first, that the tenant had not repaired the premises generally; secondly, that he had not kept them insured from fire, pursuant to the said lease. That cause came on for trial on the 12th March, 1832, at the spring assizes for the county of Kent, when, by the consent of the parties, an order was made by the Court that a juror should be withdrawn, and that the defendants should put the mills into repair on or before the 24th June, 1832, such repairs to be made to the satisfaction of Larkin and Simpson, and if they differed in opinion, then to the satisfaction of an umpire. On the 28th of March, the lessees paid to the lessor of the plaintiff a quarter's rent, which had become due on the 25th of March. The premises were not put into repair to the satisfaction of the referees, and on the 2d of July the declaration in the present action of ejectment was served, entitled, "Thursday, 28th June, in Trinity term, 2 Will. 4." An order for delivery of particulars of the breaches complained of in the second action was obtained, and the breach assigned by the lessor of the plaintiff was, the not repairing within three months after notice, pursuant to the proviso in the lease. A verdict having been found for the plaintiff,

Thesiger now moved for a rule nisi for a new trial, on two grounds; first, that another notice to repair was necessary; and secondly, that the action was not well brought under the 1 Will. 4, c. 70, s. 36. It is clear, that notice to put the premises in repair was necessary. The plaintiff, by consenting to the order of the Court, when the first ejectment was tried, that a juror should be withdrawn, waived the notice which he had previously given. The order of Court, by substituting new terms of agreement, superseded the notice. The case resembles that of *Doe v.*

Meur. (a) By analogy to that case, this ejectment could not be maintained during the existence of an order of Court. A new notice to repair was therefore necessary. The acceptance of rent only a few days before the time at which the notice would expire, must be considered as a waiver of the notice and an abandonment of any right of re-entry then accrued. Secondly, the notice, if good, expired on the 6th of April; the right of entry therefore accrued on the 7th of April, which was before the commencement of Trinity term. This case therefore is not within 1 *Will.* 4, cap. 70, s. 36. That statute applies only to cases where the right of entry accrues during or immediately after Hilary or Trinity terms.

1832.

 DOE
 v.
 BRINDLEY.

PARKE, J.—There is no ground for granting a new trial upon either point. Notice to repair was given on the 6th of January. If the premises were not put into repair by the 6th April, the landlord had a right of re-entry, and not before that time. The first ejectment could not therefore have been supported for the breach of the covenant to repair. That ejectment was determined by the order of Court. The case is the same as if the defendant had agreed to repair the premises before the 24th of June. That agreement not having been complied with, the parties are in the same situation as if no action had been brought, and they are at liberty to bring another ejectment. The receipt given on the 28th of March for rent due on the 25th, cannot be construed into a waiver of the notice, which did not expire until the 6th day of the following month; for at the time the rent became due, the right of entry had not accrued. The second objection cannot be taken at *nisi prius* or under the general issue, as it is merely an objection to the regularity of the proceedings.

TAUNTON, J.—The order of Court did not supersede the notice to repair, but merely enlarged the time during

(a) 4 B. & C. 606; 7 D. & R. 98.

1832.
 ~~~~~  
 Doe  
 v.  
 Brindley.

which the repairs were to be made. The notice to repair was suspended by the order of Court, and the non-compliance with the terms of that order again brought the notice into operation.

PATTESON, J.—I am of the same opinion; I think we may connect the notice to repair with the second action of ejectment.

Rule refused.

---

WAGSTAFF and another v. WILSON.

A letter written before action brought, but with reference to the subject in dispute, by a person who is afterwards the defendant's attorney on the record, cannot be read as evidence of a fact admitted in such letter without further proof of authority to make such admission.

**TRESPASS** for taking the plaintiff's horse. At the trial before *Parke, J.* at the summer assizes for the county of York, the plaintiffs' counsel, in order to shew that the trespass was committed by the direction of the defendant, offered in evidence a letter written previously to the commencement of the action by the persons who were the defendants' attorneys in the action, one of them being the attorney on the record. This letter was addressed to the plaintiffs' attorney, in answer to a letter from him demanding the horse, and was as follows:—  
 "Dear Sir,—Mr. *Wilson* has brought us your letter of the 16th instant, respecting a horse belonging to Mr. *Wm. Storey* his tenant, distrained for rent in arrear. We are fully prepared to prove that the horse in question was legally distrained with other chattels by Mr. *Wilson's* authority, and was afterwards removed from the premises by your client or his agents, and therefore we think Mr. *Wilson* justified in the steps he has taken. Yours, &c. *Smith and Hind.*" It was objected that this letter could not be received as evidence against the defendant. The learned judge rejected the evidence and directed the plaintiff to be nonsuited.

*Hoggins* now moved for a rule nisi for a new trial, on

the ground that the letter ought to have been admitted as evidence against the defendant. There are several cases to shew that evidence of this description is admissible. In *Marshall v. Cliff*(a), which was an action against the defendants, as owners of a ship, for not properly carrying the goods of the plaintiff, to prove that the defendants were owners of the ship, a letter written by the person who was afterwards the attorney on the record, in which he undertook to appear for the defendants as owners of the ship, was admitted in evidence. Lord *Ellenborough* there says, "I think this is sufficient *primâ facie* evidence. I must presume that Mr. C., who is now the attorney on the record, was then the agent of the defendants, and had authority from them to admit that they were joint owners of the vessel." In *Roberts v. Lady Gresley*(b), the plaintiff wrote to a Mr. King for payment of the debt due from the defendant; he answered the letter and paid part of the demand; the plaintiff's attorney addressed another letter to King, to which he received a letter in reply. Lord *Tenterden* admitted the second letter of King as evidence against the defendant. In *Peyton v. The Governors of St. Thomas's Hospital*(c), a letter written by the surveyor who had the management of the buildings of the defendants, was admitted as evidence against them. In *Wilmot v. Smith*(d), an attorney sent a letter requiring payment of the demand; and it was held, that a tender made to the attorney after the letter had been sent was good.

PARKE, J.—You want to make the circumstances of *Smith* and *Hind* being the attorneys in the cause, evidence that they were the agents of the defendants before the action was commenced. There is no authority for that position. The case of *Marshall v. Cliff*, if that is to be taken as a correct decision, is distinguishable from the

1832.  
  
 WAGSTAFF  
 v.  
 WILSON.

(a) 4 Campb. N. P. C. 133.

(b) 3 C. & P. 380.

(c) 4 M. & R. 625; S. C. not  
 S. P., 9 B. & C. 725.

(d) 3 C. & P. 455.

1832.

WAGSTAFF

v.

WILSON.

present. In that case the letter contained an undertaking to appear, which was a step *in the cause*. *Roberts v. Lady Gresley* may be distinguished, on the ground that *King* was shewn to have been once the agent of the defendant, and must therefore be presumed to have continued so. The two other cases cited are also very different from the one before us.

TAUNTON, J. and PATTESON, J. concurred.

Rule refused.

DOE on the demise of DALTON v. JONES and another.

Enlargement of windows, opening external doors, and taking down partitions,<sup>(a)</sup> no breach of covenant to repair and keep in repair a dwelling-house, together with all such buildings, improvements, or additions, as should be erected, set up, or made, by the lessee.

THIS was an action of ejectment brought for a forfeiture incurred by the breach of a covenant in a lease. At the trial before *Alderson, J.* at the summer assizes for Glamorganshire, it appeared that the deviser of *Dalton*, the lessor of the plaintiff, by indenture of the 25th of March, 1819, demised to *Jones* a dwelling-house with the appurtenances, situate in Wine Street, Swansea, for a term of forty years. The indenture contained a covenant that the lessee would repair and keep repaired "all the said messuage or dwelling-house, garden, and premises thereby demised; together also with all such buildings, improvements, and additions whatsoever, as at any time during the said term should be created, set up, or made by him the said *Thomas Jones*, his executors, administrators, or assigns thereupon." The indenture also contained a covenant on the part of the lessee, that "at the expiration or sooner determination of the said term, he would peaceably and quietly leave, surrender, and yield up unto the said lessor, his heirs or assigns, or to whom he or they should direct, all the said messuage or dwelling-house in good substantial and te-

(a) *Post*, 8 (n).

nantable repair, together with the several fixtures and other things then on and affixed to the premises." Proviso, that if the lessee did not observe and perform all the covenants contained in the lease, the term thereby granted should cease, and the lessor, his executors, administrators or assigns, might enter and reposseas the dwelling-house with the appurtenances as of his or their former estate. It was proved that the defendant *Jones* had let part of the dwelling-house to the other defendant, who took the two windows out of the front parlours, and in their place put in two new shop windows of larger dimensions, and converted the lower part of the building into an exhibition room for pictures. For this purpose he also broke down an internal partition, closed one door, and opened another. Upon this evidence the learned judge directed the plaintiff to be nonsuited, on the ground that there was no breach of the covenant to repair.

1832.

DOE  
v.  
JONES.

*Whitcomb* now moved for a rule nisi to set aside the nonsuit. The facts proved at the trial clearly amounted to a breach of the covenant to keep in repair. In *Doe d. Vickery v. Jackson* (a), the defendant had broken a doorway through the wall of the demised house into the house adjoining; and Lord *Ellenborough* held that this was a breach of a covenant to repair, and amounted to a forfeiture. [*Patteson*, J. In that case the external wall was broken.] In this case the external wall has been broken for the purpose of inserting the larger windows. In 22 *Vin. Abr.* 439 (b), it is said, "If a lessee flings down a wall between a parlour and a chamber, by which he makes the parlour more large, it is waste, because it cannot be intended for the benefit of the lessor, nor is it in the power of the lessee to transpose the house;" (c) and in a note to the

(a) 2 Stark. N. P. C. 293.

(b) Waste (D), pl. 19.

(c) *Rolle*, from whom this placitum is translated, cites 13 *H.* 7,

fol. 37 b., which appears to be a false reference, the last folio of that year in the printed Year Book being 28.

1832.

DOE  
v.

JONES.

same placitum it is said, "So of a partition between chamber and chamber." (a) [*Taunton, J.* This may be waste, and yet not within the covenant.] That which the law considers as waste cannot be held to be an improvement. [*Parke, J.* If you pull down an old house and build a new one it is waste.] The word improvements must be considered with reference to the subject purposed to be improved. It cannot be an improvement of a dwelling-house to convert it into a shop.

By the COURT.—There is no ground for granting this rule prayed for. The tenant might if he pleased have converted this dwelling-house into a shop; and we are most clearly of opinion, that the enlarging of a window, the taking down of a partition, or the opening a new doorway, are not breaches of this covenant to repair, or a forfeiture of the term. The lease contemplates that additions and alterations will be made to the house, and the covenant to repair applies only to the usual wear and tear in the occupation of the house.

Rule refused (b).

Removal of  
partitions.

(a) *Brooke*, from whom (Waste, fo. 143,) this note is translated, cites 10 H. 7, fo. 2. But upon reference to the original (M. 10 H. 7, fo. 2, pl. 3), it will be found that the Court says, "If there be a partition within the house between certain chambers, it is lawful for the termor to destroy them and make union of all those chambers."

Special waste.

(b) So, where a lease contained a proviso for re-entry if the lessee committed waste to the value of 10s., and the lessor re-entered and

brought ejectment in consequence of the tenant's having pulled down some old buildings of more than 10s. value and substituted others of a different description:—Held, that the waste contemplated in the proviso, was waste producing an injury to the reversion; and that it was a question for the jury whether, under all the circumstances, such waste to the value of 10s. had been committed. *Doe d. Earl of Darlington v. Bond* and others, 5 B. & C. 855; 8 Dowl. & R. 738.

## The KING v. The Inhabitants of PADSTOW.

1832.

**THIS** was an appeal against an order of justices for the removal of *Marianne Old* and her six children from the parish of Little Petherick to the parish of Padstow, both in the county of Cornwall. The Court of Quarter Sessions confirmed the order, subject to the opinion of this Court upon the following case.

In support of the order of removal the respondent parish proved by parol evidence, that in 1828 the pauper's husband, *Martin Old*, who is now living in America, rented two fields in the parish of Padstow of one *Corkhill*, at 15*l.* a-year; that he occupied and paid the rent from Michaelmas 1828 to Michaelmas 1830; and that during the first year of such tenancy and occupation, he resided in the parish of Padstow for a period of forty days and upwards. For the appellant parish, a witness was called who stated that he had been a clerk of the said *Corkhill*, who has since become a bankrupt; that he was present in 1828, when the said *Martin Old* took the fields in question of his master, and that the conditions of the said taking were reduced into writing and signed by the parties on unstamped paper.

The question submitted to the opinion of the Court of K. B. is, whether the Court of Quarter Sessions was justified in confirming the order, or whether erasing the evidence previously given on the part of the respondents, and rescinding the conclusion which arose upon that evidence, the Court of Quarter Sessions ought to have quashed this order of removal.

*Coleridge*, Serjt. and *Crowder*, in support of the order. It is admitted that since the passing of 6 Geo. 4, cap. 57, the terms of the tenancy may become material; and where there is a written agreement it ought in general to be pro-

If one party prove a contract without its appearing either upon the examination in chief or upon cross examination that the contract was reduced into writing, and the adverse party proves that the contract was reduced into writing, it is incumbent upon such adverse party to produce, or to procure the production of, the written instrument.



1832.  
 The KING  
 v.  
 PADSTOW.

duced. Here a *prima facie* case was made out by the respondents, without shewing that there was a written agreement respecting the tenancy. The appellants afterwards proved by their own witness that there was a written agreement. After the respondents had finished their case, the appellants could not take advantage of the written agreement without producing it themselves; *Fielder v. Wray* (a). If it was intended that the respondents should produce the written agreement, notice should have been given them to do so; *Stevens v. Pinney* (b).

*Follett contra.* This is a point not only of evidence but of practice. The settlement, if acquired, was gained under the 6 Geo. 4, cap. 57. It was therefore necessary to prove the terms of the tenancy by the agreement. No settlement can now be gained by proving merely the occupation and payment of rent. If it be proved in any part of the case that there is an agreement in writing, it ought to be produced.

By the COURT.—The rule is perfectly well established. If it appear on cross-examination of the plaintiff's witness that there is a written contract, the plaintiff must produce it: if the defendant prove it by his own witness, the defendant must produce it. The practice has always been in accordance with this rule.

Order of Sessions confirmed (c).

- |                                        |                                          |
|----------------------------------------|------------------------------------------|
| (a) 6 Bingham 332; 3 M. & P. 659.      | <i>Trinity and St. Margaret's, Hull,</i> |
| (b) 8 Taunt. 328.                      | 1 Mann. & Ryland 444, 7 B. & C.          |
| (c) And see <i>Bucher v. Jarratt</i> , | 611; <i>Rex v. Rawden</i> , 3 Mann. &    |
| 3 Bos. & Pul. 143; <i>Rex v. Holy</i>  | Ryland 426, 8 B. & C. 708.               |



## BAXTER v. TAYLOR.

1832.

**THIS** was an action on the case, brought by the plaintiff, as reversioner, for an injury alleged to be done to his reversion. The declaration stated that certain fields, called the **Stony Butts Closes**, and a certain lane, called the **Stony Butts Lane**, in the parish of **Halifax**, in the county of **York**, were in the respective occupations of certain individuals as tenants thereof to the plaintiff, and that the defendant, well knowing the premises, and intending to injure the plaintiff in his reversionary estate, whilst the said closes were in the occupation of the said tenants and whilst the plaintiff was so interested therein as aforesaid, placed rubbish upon the closes called **Stony Butts Lane**, and also with horses and carriages destroyed parts of the same closes, and prostrated the walls thereof. At the trial at the **Yorkshire summer assizes** for the year 1832, before *Parke, J.*, it appeared that the plaintiff was entitled in fee to the closes mentioned in the declaration, and that the land was let out to tenants from year to year. The defendant, who was the owner of an adjoining farm, claimed a general right of way over the **Stony Butts Lane**. After hearing the evidence for the plaintiff, the learned judge was of opinion that no injury to the plaintiff's reversion had been proved, and accordingly directed a nonsuit to be entered, giving to the plaintiff, however, leave to move to set it aside and enter a verdict.

Reversioner cannot maintain an action against a stranger for acts of trespass on the land, unattended with any other injury to the reversion than as being committed in assertion of the claim of a right of way.

*F. Pollock* now moved accordingly. The question is, whether a reversioner, who has granted a lease, can maintain an action for an injury done to his reversion by the mere assertion of a right of way. Although a reversioner cannot maintain an action for every injury, yet for a series of injurious acts, likely to prejudice the title, he may do so. The reversioner cannot compel the tenant to allow him to use his name; and by acts like these not only the present

1832.  
  
 BAXTER  
 v.  
 TAYLOR.

state of the property may be deteriorated, but the future right may be prejudiced. [*Parke, J.* Can you find any case in which the reversioner has maintained an action except where the injury complained of was of a permanent nature, as, for example, the building of a wall? The last case on this subject is *Sir Launcelot Shadwell v. Hutchinson (a)*.] Where the act done is to establish a claim, it is prejudicial to the reversioner, if the reversioner be at hand and knows what is going forwards. But if it would not establish a right in the party doing the act, it would be at least evidence to go to the jury to shew that the act was done adversely to the plaintiff, and as a matter of right to the defendant; *Young v. Spencer (b)*. [*Patteson, J.* That was an action on the case in the nature of waste. *Parke, J.* In that case there was a permanent injury.] The injury done to the reversioner is, that the right is prejudiced by the frequent exercise of an alleged right of way by the defendant. An act of trespass done as a matter of right is calculated to prejudice the title of the reversioner. In this case the closes of the plaintiff and the defendant adjoined, and the defendant wished to establish a right of way, in order that he might acquire a frontage for some houses of which he was possessed.

TAUNTON, J.—The rule in this case ought not to be granted. I lay the case of *Young v. Spencer* entirely out of the question. In that case the action was brought by the lessor against the lessee. This is an action brought by the lessor against a stranger. One rule may be applicable to the former case, another rule to the latter. The action against the lessee is an action of waste. It was decided in *Jackson v. Pesked (c)*, that where the plaintiff claims as a reversioner, the declaration must either allege that the act complained of is to the damage of the reversioner, or state an injury of a permanent nature. If neither of these alle-

(a) 2 Barn. & Ad. 97.

(c) 1 M. & S. 234.

(b) 5 M. & R. 47; 10 B. & C. 152.

gations be in the count, the count is bad: they are therefore material. Now, what is proved here? That the defendant passed over the land with a cart and horses, and no material injury was sustained. It appears to me, in fact, to be an injury of so transient a nature, that it might as well be contended that the reversioner could maintain an action if a boy should fly his kite across the land. But it is said that acts of this description prejudice the right to the land. Acts of this sort cannot enure as evidence against the lessor, since the lessor cannot be prejudiced unless he has a remedy at law. What remedy has the lessor? He cannot maintain trespass; nor, in my humble opinion, an action on the case. How, therefore, can the lessor be injured without having a remedy. In the case of *Wood v. Feal* (a), the lessee had dedicated or relinquished a street, called Little Abingdon Street, to the public for ninety-nine years, yet it was held that the owner of the fee might inclose it. The principle of that case, although it is not so stated by any of the judges, was, that it could not be considered as a dedication by the owner of the fee, for during the lease he could not redress the injury done to him. So in this case, supposing the trespass should hereafter be brought forwards as evidence of a right of way, it would be said to the jury, you are not to consider this act as an assertion of a right against the lessor, because at the time the act was done he had no remedy. For these reasons I am of opinion the rule ought to be refused.

1832.  
BAXTER  
v.  
TAYLOR.

Dedication of  
a highway,  
not to be pre-  
sumed against  
reversioner.

PATTESON, J.—The nonsuit in this case was right. The case of *Young v. Spencer* is distinguishable from this case in two respects. First, that was an action by the lessor against the lessee, which is an action on the case in the nature of waste; and, secondly, the opening of the new door, which is the injury complained of in *Young v. Spencer*, is an injury of a permanent nature. To enable the reversioner to maintain an action for an injury to his

Distinction  
between case  
by lessor in  
the nature of  
waste, and  
case by rever-  
sioner for per-  
manent injury.

(a) 5 B. & A. 454; 1 D. & R. 20.

1832.

BAXTER

v.

TAYLOR.

Case by reversioner for injury to title.

Action by landlord in name of tenant.

reversionary interest, there must be an injury of a permanent nature. If the title be prejudiced, an action by the reversioner is maintainable; but in this case there would be no injury to the title. It is no hardship upon the landlord that he is not allowed to bring an action for an injury of this description, as he may by covenant compel his tenant to allow him to use his name in any action; and I think we may leave the landlord and tenant to arrange this between themselves. If we go further than the case of *Young v. Spencer*, we shall gradually establish a new species of action.

Destruction necessary to support case by reversioner.

PARKE, J.—I agree that this action is not maintainable. No injury has been done to the reversion. My notion is, that there must be some destruction of the land to enable the reversioner to maintain this action. No case has ever gone so far as to constitute a simple trespass like this an injury to the reversion. The case of *Young v. Spencer* is distinguishable from the present. The words of Lord *Tenterden* in that case are to be considered with reference to the subject-matter of decision; and he is there stating what in his opinion are acts of *waste*.

Rule refused.

Where a child is bound apprentice by the parish of *A.* to a master resident in the parish of *B.*, notice of the intended binding must, under 56 G. 3, c. 139, be given to the overseers of *B.*, though *A.* and *B.* are in the same county.

The KING v. the Inhabitants of THRELKELD.

UPON an appeal against an order of justices for the removal of *William Thompson* from the township of Keswick, in the county of Cumberland, to the township of Threlkeld, in the same county, the Court of Quarter Sessions confirmed the order, subject to the opinion of this Court on the following case:—

The pauper, *William Thompson*, a poor boy, of and then legally settled in the said township of Threlkeld, was, on the 20th day of January, 1819, pursuant to an order of two justices of that county, bound apprentice by the church-

wardens and overseers of the poor of the said township of Threlkeld, to *Edmund Forster*, of and residing within the township of Keswick, in the same county, by indenture, for a term therein mentioned.

1832.  
  
 The KING  
 v.  
 THRELKELD.

The township of Keswick is in the parish of Crosthwaite, and is about four miles distant from the township of Threlkeld, which is in the parish of Greystoke; each township maintains separately its own poor, and both parishes are in the same county, and within the jurisdiction of the two justices of the peace who made the order for the binding, and who afterwards signed their allowance of the indenture above mentioned.

No notice was given to the overseers of the poor of the township of Keswick, or to any of them, of the intention to bind out such apprentice, nor did any of the overseers of the township of Keswick attend the justices who signed their allowance of the said indenture, or either of them, and admit such notice; but the binding as well as the service and residence under it, was in all respects such as to confer a settlement upon the pauper in the township of Keswick.

The question for the opinion of the Court is, whether such notice was necessary under the circumstances above stated; if it was, then the order of sessions is to be confirmed; if it was not, then the order of sessions is to be quashed.

Sir *J. Scarlett* and *Armstrong*, in support of the order of sessions. The question before the Court turns upon the construction of the 2d section of the 56th Geo. 3, c. 139. The point raised by this case is different from that decided in *Rex v. Inhabitants of Newark on Trent* (a), In that case the two parishes were situate within two distinct jurisdictions of the peace; in this case both parishes are within the same jurisdiction. Mr. *J. Holroyd*, in that case, expressed an opinion founded upon the language

(a) 4 D. & R. 745; 3 B. & C. 59.

1832.  
 The KING  
 v.  
 THRELKELD.

of the section, that notice was necessary. The whole argument of Mr. J. *Holroyd* is in point. Towards the conclusion of his judgment (a) that learned judge thus expresses himself:—"The intent, as far as I can collect, is, that notice should be given to the overseers of the parish in which it is intended the child should serve, in all cases, whether the binding be into the same or into a different county." The act was framed for the protection of poor apprentices; the policy of the act, therefore, requires that notice should be given in this case, as well as where the parishes are under two different jurisdictions of the peace. The officers of a parish situate at one end of a county might be, and most probably would be, quite as ignorant of what had taken place in a parish at the opposite end of the same county, as they would be of that which had occurred in a different county.

*F. Pollock and Aglionby, contra.*—The 2d section of the act upon which this question arises, is only applicable to the case where a child is bound apprentice from one county to another. The provision as to notice is at the conclusion of the 2d clause. It is admitted that the division of a statute into clauses makes no difference in the legal construction of it; yet it may be fairly inferred that a proviso inserted at the conclusion relates only to the particular circumstances which have immediately preceded it. The right to a settlement ought not to be taken away except by express words (b). In this act the meaning is by no means clear and explicit. It was Lord *Tenterden's* opinion, in *The King v. Newark upon Trent*, that no notice

(a) 3 B. & C. 75.

(b) A person who gains a settlement in *A.* loses his settlement in *B.*; or if he be a foreigner and has acquired no settlement, he loses his right to permanent relief in any parish, except *A.*, in which he may happen to be. The Court cannot presume that it is more advan-

tageous to the pauper to be settled in *A.* than in *B.*; and it will hardly be inferred from the circumstance of a pauper's having manifested his preference by some act unequivocally done by him for the fraudulent purpose of transferring his settlement from the one parish to the other.

was necessary. The justices of the county in which the binding parish is situate are more likely to be informed, and have better means of obtaining information as to what happens in their own county than as to that which passes in another.

1832.  
  
 The KING  
 v.  
 THRELKELD.

DENMAN, C. J.—The pauper would gain a settlement in Keswick unless he was prevented by the 5th section of the act of the 56 *Geo. 3*, cap. 139. That section enacts that no settlement shall be gained by any parish apprentice by reason of his apprenticeship, unless such order shall be made, and such allowances of such indenture of apprenticeship shall be signed, as thereinbefore directed. The first section of the act, after reciting that many grievances had arisen from binding poor children as apprentices by parish officers, directs that before any child shall be bound apprentice, such child shall be carried before two justices of the county wherein such parish shall be situate, who are to inquire into the propriety of binding such child apprentice, and to examine the parents, and inquire into other matters; and if such justices shall think it proper that such child should be bound apprentice, they are to make an order for such purpose, and after the order is made the justices are to sign an allowance of the indenture of apprenticeship before the same is executed by any of the other parties. Then follows a proviso as to binding the apprentice to persons resident out of the county.

The second section of the act is to this effect:—That in all cases where the residence of the person to whom any child shall be bound shall be within a different county or jurisdiction of the peace from that within which the place by the officers whereof such child shall be bound shall be situated, and in all other cases where the justices of the peace for the district or place within which the place by the officers whereof such child shall be bound shall be situated, and who shall sign the allowance of the indenture by which such child shall be bound, shall not have juris-



1832.  
 The KING  
 v.  
 TREBLKELD.

diction, every indenture by which such child shall be bound shall be allowed, as well by two justices of the peace for the county or district within which the place by the officers of which such child shall be bound shall be situated, as by two justices of the peace for the county or district within which the place shall be situated, wherein such child shall be intended to serve; then there is a proviso that no indenture shall be allowed by any justice who shall be engaged in the same business in which the person to whom such child shall be bound is engaged; and then comes the proviso upon which this question arises, which is in these words:—

“And notice shall be given to the overseers of the poor of the parish or place in which such child shall be intended to serve an apprenticeship, before any justice of the peace for the county or district within which such parish or place shall be, shall allow such indenture; and such notice shall be proved before such justice shall sign such indenture, unless one of such overseers shall attend such justice and admit such notice.” It is found in the case that no notice was given to the overseers of the poor of the township in which the apprentice was bound; and it is contended that no notice is necessary where the parties are residing within the same county. I am of opinion that notice was necessary, and that consequently no settlement has been gained. It seems almost absurd to contend that notice is necessary where the two places are situate in different counties, and that it is not necessary where they are situate in the same county; as if the merely passing a boundary line can make a difference. The preamble points out what was the intention of the legislature in passing this act. It was, that every care should be taken of the bringing up of the apprentice. It has been argued that it was a forfeiture of settlement to the apprentice, and was to his detriment (a); on the contrary, the necessity of the notice tends to make his settlement known with greater certainty, and is therefore to his advantage. I do not feel that it is necessary to make

Certainty as  
 to place of  
 settlement,  
 advantageous.

(a) *Vide ante*, 16 (a).

all the clauses consistent; the words "such notice," in the second section of the act, do not confine the necessity of notice to cases where the intended master and apprentice reside in different jurisdictions of the peace. There is no grammatical violence done to the words by this construction; and by so construing this statute, we are doing what is beneficial to the apprentice. The particular circumstances of this case cannot be taken into the consideration of the court; many cases of hardship might be put on the other side. No argument can be drawn on either side from any presumption of personal knowledge in the justices. It is just as probable that they should be aware of what was transacting in a county immediately adjoining, as in their own county.

1839.  
The KING  
v.  
THRELKELD.

PARKE, J.—I am of opinion that the order of sessions is right. There is no rule of law which calls upon us to give a strict construction to this act. We are to endeavour to discover in the first place what the intention of the legislature is; and then we are to see whether there are words in the act of parliament sufficient to carry that intention into effect. There are no words to show a difference in the principles applicable to those cases where the binding is in a different county, and to those where it is in a different parish in the same county. The words of the statute extend to both these cases. No argument has been adduced to show that the words are not so applicable, except that founded upon the situation of the proviso; but it should be recollected that on the parliament roll the statutes are not divided into clauses, and that therefore we are bound to construe the whole of the statute together. With regard to the first proviso—which requires the notice to be given to the overseers—it certainly struck me that the reason of the thing required that this enactment should extend to all cases, and I can see nothing in the subsequent section which limits the application of the previous clause. I think the judgment of Mr. J. Holroyd, in the case of

Construction.

Statutes not  
divided into  
clauses.

1832.  
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 The KING
 v.
 THRELKELD.

Rex v. Newark upon Trent, is right; and that the words in the second section requiring notice, apply to all cases. I therefore think that the order of sessions ought to be confirmed.

Allowance of
 indenture by
 justice of same
 trade.

TAUNTON, J.—There are expressions in the second section which I do not understand; but I see enough to satisfy me that the order of sessions is right; enough to convince me that that part of the second section which relates to the notice, is a general enactment. I am by no means satisfied that the prior part of the proviso, which says that an indenture shall not be allowed by a justice of the peace of the same trade as the intended master, is not a general enactment; but upon this I give no opinion. I am unable to see why notices should be given where the parties live in different counties, and not where they reside in different parishes in the same county. If the statute is construed with a view to the policy of the act, there can be no doubt that notice is as necessary in one case as in the other. A magistrate may be entirely unacquainted with what is passing at the opposite end of the county in which he resides, at the same time that he is familiar with the transactions of a neighbouring parish, which happens to be in an adjoining county.

PATTESON, J.—I am also of opinion that no settlement was gained by the pauper in this case. The statute requires that notice shall be given to the overseers of the intention to bind a child to a master residing in their parish. Here no notice was given, and therefore there has not been such a valid binding as will confer a settlement upon the apprentice. It appears to me that notice is equally required in the one case as in the other. No violence is done to the grammatical construction of this section, by applying its provisions to both cases. Upon these grounds I think that the order of sessions ought to be confirmed.

Order of Sessions confirmed.

The KING v. The Inhabitants of OSSETT-CUM-GAWTHORPE.

1832.

UPON an appeal against an order of justices, whereby *George Clarke*, his wife and child, were removed from the township of Leeds, in the West Riding of the county of York, to the township of Ossett-cum-Gawthorpe in the said Riding, the court of quarter sessions confirmed the order of removal, subject to the opinion of this Court upon the following case :

The birth of the pauper in the township of Ossett-cum-Gawthorpe was admitted by the appellants; and the respondents admitted a hiring and service in their township under the following agreement, for the time therein mentioned :

“ Memorandum of an agreement, made and concluded this 25th day of the fourth month, 1826, between *John and Thos. Walker*, of Leeds, cloth merchants, on the one part, and *Geo. Clarke*, with the consent of his father, on the other part : that the said *Geo. Clarke* doth hereby agree to become the hired servant of the said *John and Thos. Walker* for the term of five years, to do such work as belongeth to the finishing of cloth, and to take any part of work the said *John and Thos. Walker* shall think proper, and do the same to the best of his knowledge, justly and faithfully. This being done, the said *John and Thos. Walker* promise to pay unto the said *Geo. Clarke* ten shillings per week for the first two years, and eleven for the third year, twelve for the fourth year, and thirteen for the fifth and last year. *The hours of working to be from six o'clock in the morning until seven o'clock in the evening, and to be paid for all over time and deducted for all short, either in sickness or in health.* And the said *Geo. Clarke* promises to conduct

A. contracted to become the hired servant of B. for 5 years, to do such work as belongeth to the finishing of cloth, and to take any part of work B. should think proper; and B. promised to pay unto A. 10s. per week for the first 2 years, 11s. for the 3d, 12s. for the 4th, and 13s. for the 5th year; the hours of working to be from 6 o'clock in the morning until 7 o'clock in the evening, and to be paid for all over time, and deducted for all short, either in sickness or in health. This is not an exceptive hiring; and service under this contract confers a settlement.

1832.

 The KING
 v.
 OSSETT-CUM-
 GAWTHORPE.

himself in an honest, sober and industrious manner, as per agreement. As witness our hands

Hiring fee, 1s.

Witness,

Jonas Vince. +

John Walker.

Thos. Walker.

George Clarke. +

Thomas Clarke."

The Court of Quarter Sessions submit to the opinion of the Court of King's Bench whether, under the above circumstances, the pauper, *Geo. Clarke*, gained a settlement by such hiring and service in the respondents' township, &c.

Milner and *Baines*, in support of the order of sessions. In order to gain a settlement by hiring and service, it is necessary that the servant should be under the control of the master during the whole year. In this case the servant was not under the control of his master after seven o'clock in the evening until six o'clock on the following morning. The case of *The King v. Birmingham* (a) resembles the present. In that case the pauper hired himself to work from six in the morning until seven in the evening, with liberty to make as much over-work as he pleased. It was there held that that contract was an exceptive hiring. To the same effect is the case of *The King v. Frome Sellwood* (b). There the pauper contracted to serve his master in summer from six in the morning until seven in the evening, and in winter from seven in the morning until eight in the evening; and he was not to work for or serve any other person: yet that also was held to be an exceptive hiring. The present case is stronger than that, as here there is no proviso that the pauper should not work for any other person. The cases of *The King v. North Nibley* (c) and *The King v. St. John, Devizes* (d), are in point. The terms of the contracts in those cases are in substance similar to this. The case

(a) 9 B. & C. 925.

(c) 5 T. R. 21.

(b) 1 Barn. & Adol. 207.

(d) 9 B. & C. 896.

of *The King v. Byker* (a) will probably be relied upon on the other side; but that case was much pressed in *The King v. Birmingham*, and it was held that they were distinguishable. In *The King v. Byker* it was expressly stipulated that the authority of the magistrates should continue during the whole period of the pauper's service. In the case of *The King v. Frome Sellwood* stress was laid upon the fact that the servant was employed for a particular species of work, and was not hired generally. So here, the pauper was hired to do work of a particular nature, namely, the finishing of cloth. Had the pauper, in the present case, refused to work after seven in the evening or before six in the morning, no justice of the peace, looking to the words of the contract, could have compelled him to do so. The words "to be paid for all over-time," &c. can make no difference, for there were similar words in the contract in *Rex v. Edgmond* (b), and the hiring was, nevertheless, held an exceptive one.

Blackburne and *Sir Gregory Lewin*, contra. If in the contract of hiring there be an express exception of any time, it is admitted that that is an exceptive hiring; but the question is, whether it appears on the face of this agreement that the pauper agreed to give all his time to the service of his masters. The contract consists of two parts. It first says that *Geo. Clarke* shall become the hired servant of *J. and T. Walker* for five years. Then the mode of remunerating him is provided for. He is to work from six in the morning until seven in the evening for a certain sum, and to be paid for all the time which he works beyond that according to the same rate of payment. The time of working is in fact mentioned only as the measure of the payment of the wages. In the case of *The King v. Birmingham* the pauper had the option whether he would work or not. In the case of *The King v. Frome Sellwood* no wages would

1832.
The KING
v.
OSSETT-CUM-
GAWTHORPE.

(a) 2 B. & C. 114.

(b) 3 B. & Ald. 107.

1832.

 The KING
 v.
 OSSETT-CUM-
 GAWTHORPE.

be given for over-time. *The King v. Byker* is in point. In that case, as in the present, there was first an engagement to work absolutely, and then the remuneration for the work was stipulated for. The principle of the case of *Hopkins v. Thorogood (a)* is applicable to this agreement. It was there held, that if there be two clauses in an act of parliament, the latter of which is supposed to control the former, and the first is clear and the second obscure, the former clause shall not be construed with reference to the subsequent clause. If it were held that a person contracting to serve in any particular species of trade did not gain a settlement, that would exclude all bankers' and merchants' clerks from gaining settlements. There has been no case in which it has been held that the contract for service has constituted an exceptive hiring, unless the exception had been expressed in the agreement either in direct affirmative or negative terms.

DENMAN, C. J.—It is almost impossible to decide this case without interfering in some manner with the authorities on the one side or on the other. It approaches very nearly the line of demarcation between the cases. I am of opinion that this is not an exceptive hiring; and that the contract of service gave to the master control over the pauper during the whole period of his service. The contract must be construed in the manner stated by Mr. *Blackburne*; first, that it contained an absolute engagement on the part of the pauper to serve, and then that the subsequent part is merely providing for the remuneration which he is to receive. The pauper had not the option of refusing to work, but he was to be paid for all the over-time during which he worked. I do not find any sufficient ground for saying that there was any period of time when he was not under the control of his master. I think also that in order to make the hiring exceptive, there should have been an express stipulation that the pauper should be under no

Character of
 exceptive
 hiring.

(a) 2 Barn. & Adol. 916.

control during the over hours. Upon the whole I think that this is a general, and not an exceptive, hiring, and therefore that a settlement was gained by the pauper by his service under it.

1832.

 The KING
 v.
 OSSETT-CUM-
 GAWTHORPE.

PARKE, J.—I am of the same opinion. Upon the true construction of the contract, I think there was no period of time during which the master could not command the services of the pauper. The mode of ascertaining whether the servant was in the service of his master during the whole of each day would be to inquire what would have been the situation of the parties in case there had been an extraordinary demand for work. Looking to the whole contract, might not the master have called on the servant to work out of the specified hours? The contract begins with a general engagement on the part of the pauper to serve. That being done, the agreement goes on to regulate the rate of wages; and the clause relating to the hours of working is only definitive of the number of hours for which the specified sum was to be paid. *The King v. Byker*, it seems to me, is scarcely distinguishable from the present case. In *The King v. Birmingham* it was expressly provided that the over-work should be optional with the servant. In the case of *The King v. Frome Sellwood* there was no stipulation that wages for the over-time should be paid. Here, the whole of the pauper's service belonged to his master, and therefore this contract is not an exceptive hiring.

Criterion of
 continuous
 hiring.

TAUNTON, J.—The cases run extremely near to each other, and are difficult to be distinguished. Certainty is that which is most desirable in settlement cases. I regret, therefore, that I cannot agree with my Lord Chief Justice and my brother *Parke* in seeing the distinction drawn between this case and the case of *Rex v. Birmingham*. The case of *Rex v. Birmingham* and that of *Rex v. Frome Sellwood* are the latest cases decided on this subject; and

1832.

The KING
v.
OSSETT-CUM-
GAWTHORPE.

therefore ought to govern this case, unless there be some substantial difference between them. I am of opinion that this was an exceptive hiring. I think it was optional for the pauper here to work or not. The words in the contract are, that he shall work from six o'clock in the morning until seven o'clock in the evening. If it was intended that he should be under the control of his master during the whole time, why were these words introduced? The servant had a right to say, I have only stipulated to work during certain hours, and cannot be obliged to work beyond that period. I cannot distinguish this case from the cases of *The King v. Birmingham* and *The King v. Frome Sellwood*. I cannot agree in the construction which has been put upon this contract. I do not think it signifies in what particular part of a contract any stipulation is to be found; whether it is at the beginning or at the end is of no importance. I think the stipulation with respect to the over-hours was a limitation of the amount of service, and not merely a regulation concerning the rate of wages.

PATTESON, J.—I think that the pauper gained a settlement under the agreement, and that the order of sessions was right. The distinction between the cases is very refined. I regret that this should be the case in a question relating to settlements. I find great difficulty in distinguishing between these cases. I am, however, forced to make an election between *The King v. Byker* on the one hand, and *The King v. Birmingham* and *The King v. Frome Sellwood* on the other; and that being so, I am inclined to decide for the former. I thought for a considerable time during the course of the argument that this was an exceptive hiring; but upon looking at the agreement more closely, I am now of opinion that the case must be governed by *Rex v. Byker*. The pauper, I think, could not have refused to work during any period of the time.

Order of Sessions quashed.

The KING v. The Inhabitants of ORMESBY.

1832.

ON appeal against an order of two justices removing *Wm. Milestone*, his wife, and three children, from the parish of Stokesley, in the North Riding of the county of York, to the parish of Ormesby, in the said Riding, the Court of Quarter Sessions confirmed the order, subject to the opinion of this Court upon the following case:—

About Candlemas, 1827, the pauper being legally settled in Ormesby, took of one *James Emerson* a cottage and some land, both in the parish of Kirsby; both the cottage and land were bargained for at the same time, and the rent agreed upon, namely, 11*l.* 10*s.* was for both conjointly, and each was to be held for the term of one year; but the times of entering and quitting the land were different, the agreement being, that the land should be entered upon at Lady Day, 1827, and the cottage at May Day, 1827, the same to be held till Lady Day, 1828, and May Day, 1828, respectively.

Land rented and occupied from Lady Day to Lady Day, and a cottage rented and occupied from May Day to May Day, under a joint demise at 10*l.*, confer a settlement under 6 Geo. 4, c. 57, sect. 2.

The pauper entered upon the land at Lady Day, and the cottage at May Day, and quitted the former on the ensuing Lady Day, having occupied the same a year, and at May Day quitted the latter, having occupied that a year, and paid the full rent of both cottage and land at two separate payments, namely, the first half-yearly rent soon after Martinmas, 1827, and the second half-yearly rent about a week before May Day, 1828. No evidence was offered on the part of the appellants of the value of the land alone or the value of the house alone.

R. Alexander, in support of the order of sessions. This case arises upon 6 Geo. 4, c. 57, s. 2, which provides "That no person shall acquire a settlement in any parish or township, maintaining its own poor, by, or by reason of, settling upon, renting, or paying parochial rates for, any tenement, not being his or her own pro-

1832.

The KING
v.
ORMESBY.

6 G. 4, c. 57,
s. 2.

perty, unless such tenement shall consist of a separate and distinct dwelling-house or building, or of land, or both, *bonâ fide* rented by such person in such parish or township, at and for the sum of ten pounds a year at the least, for the term of one whole year, nor unless such house, or building, or land, shall be occupied under such yearly hiring, and the rent for the same, to the amount of ten pounds, actually paid for the term of one whole year at the least; provided always that it shall not be necessary to prove the actual value of such tenement." Under that section it is necessary that there should be an actual occupation for a year of a ten pound tenement. Here, there has not been such an occupation. Between Lady Day, 1827, and May, 1827, there was no occupation of the cottage, and between Lady Day and May Day in the following year there was no occupation of the land. There was consequently no conjoint occupation, for more than eleven months, of the cottage and land; and as the rent of 11l. 10s. was in respect of both, there was no occupation for a year of a 10l. tenement. The pauper's interest in the cottage between Lady Day and May Day, 1827, was a mere *interesse termini* (a); that is a right only, and not an estate, per Bayley, J. in *Doe d. Rawlings v. Walker* (b); and there was no actual possession. It cannot, therefore, be said that the pauper occupied the cottage during such interval. Between Lady Day and May Day, 1828, it is clear that the land was not occupied; for the case expressly finds that the pauper's interest therein ceased at Lady Day. Suppose the agreement had been that the land should be entered upon at Lady Day, 1827, and the cottage on the 1st

Interesse termini, when converted into an estate.

(a) If A. demise Whiteacre and Blackacre for years, habendum, as to Whiteacre from Christmas, and as to Blackacre from Lady Day, the lessee, until Christmas, has only an *interesse termini* in both; but if at Christmas he enter upon Whiteacre, the whole term

vests, and the lessee has an estate in both, which is capable of being enlarged by release, &c. And see *Miller v. Green*, 2 Crompton & Jervis, 142; post, *Doe v. Finch*, note (s).

(b) 5 B. & C. 118; 7 D. & R. 487; and see Co. Litt. 46 b; *Miller v. Green*, ubi *suprà*.

March, 1828, and each holden for a year; could it have been said that the twenty-five days' conjoint occupation of the two would satisfy the words of the act, and be equivalent to an occupation for a year? Yet the principle must be the same whether applied to one month or to eleven months. In such a case too the acquisition of the settlement would be uncertain until twenty-three months had elapsed; viz. from Lady Day, 1827, to the 1st March, 1829, which would be an absurdity. The case does not find the custom of the country, and no question can therefore be raised as to what was the substantial part of the demise. Nor would it be material if that were otherwise; for the "occupation" intended by the statute is not analogous with the "holding" contemplated by the authorities upon the doctrine of substantial entry. No inconvenience can arise from considering this an insufficient tenement, for, in similar holdings, evidence may be given of the relative proportions of the rent, and then either the house or the land, if either amount to 10*l.* a year, will suffice to confer a settlement, *Rex v. Pickering* (a). There is no decision which in any respect governs the present case. *North Nibley v. Wootton-under-Edge* (b), is distinguishable on the ground of there being there an occupation for more than 40 days, which before the recent acts would not be equivalent to a year's occupation under them. In *Rex v. North Collingham* (c), although the tenements were several in their terms and nature, yet there was an actual conjoint occupation for more than twelve months, of a sufficient value. In *Rex v. Stow* (d), although the occupation was not complete under the particular hiring for a year, yet it endured altogether and uninterruptedly for more than a year. The intention of the legislature was that there should be an occupation during one and the same year of a tenement rented at 10*l.* Here, there has not been such an occupation.

1832.

 The KING
 v.
 ORMESBY.

(a) 2 Barn. & Adol. 267.

(b) 2 Bott, 115, ed. 1809.

(c) 1 B. & C. 578; S. C. 2 D.
 & R. 743.

(d) 4 B. & C. 87; S. C. *per*
nomen Rex v. Sturton-by-Stow, 6

D. & R. 110.

1832.

The KING
v.
ORMESBY.

Starkie contrà, was stopped by the Court.

DENMAN, C. J.—The statute says that any one who rents a tenement consisting either of a divided and separate dwelling-house or building, or of land, or of both, shall gain a settlement. Here there is a taking of both land and a dwelling-house. We think that the occupation is sufficient, and that the particular circumstances of this case are not material.

PARKE, J.—The case falls within the terms of the act of parliament. If this were not so, few farmers would gain a settlement, as they usually enter upon the house and the land at different times of the year.

TAUNTON, J.—All the terms of the statute have been complied with.

PATTESON, J. concurred.

Order of Sessions quashed.

FRIEDLANDER v. LONDON ASSURANCE COMPANY.

Upon an issue whether plaintiff was interested in goods destroyed by fire, if a witness called by the plaintiff state that invoices of the goods and letters of advice, purporting to be written by him at Edinburgh, were fabricated in London after the fire, by the plaintiff's direction, it is competent to the plaintiff to call other witnesses to disprove the alleged fabrication, and show the genuineness of the documents.

THIS was an action of covenant on a policy of assurance from fire. The defendants pleaded, *inter alia*, that the plaintiff was not interested in the goods and stock mentioned in the policy of assurance, and also, that the said goods and stock were not destroyed by fire. These issues were tried at the sittings in London after last Hilary Term,

when a verdict was found for the defendants. At the trial of the cause, a witness, named *Lewis Friedlander*, residing at Edinburgh, was called by the plaintiff to prove that in Jan. 1830, he, *L. F.*, had sold goods to him to the amount of 659*l.* 14*s.* Upon his examination in chief, a letter, purporting to be written by *L. F.* from Edinburgh to the plaintiff, and certain invoices, were placed in his hands, and he was asked if the invoices and letter were in his handwriting. He said, in reply, that he had made out the invoices after the fire took place, in the presence of the plaintiff's son, *Henry Friedlander*, and *Noah Nathan*, the plaintiff's shopman, and that he had written the letter in London after the fire took place, by the direction of the plaintiff himself. Before the counsel of the plaintiff closed their case, they proposed to call the son and shopman, who had been previously examined, to contradict the witness, *Lewis Friedlander*, in his testimony with respect to the letter and invoices. Lord *Tenterden* refused to admit this evidence, on the ground that it would be breaking in upon the general rule, that a party shall not contradict his own witness. A rule nisi for a new trial was obtained by *Denman*, A. G. on the ground that the above evidence had been improperly rejected at the trial.

1832.

 FRIEDLANDER
 v.
 LONDON
 ASSURANCE
 COMPANY.

Sir *J. Scarlett* and *Campbell* now showed cause. Though a party may call witnesses to contradict a former witness as to any fact material to the issue in the cause, yet he cannot bring forward evidence, the tendency of which is solely to throw general discredit on such former witness. The only operation of a contradiction as to matters merely collateral (as it establishes no part of the case), is to throw discredit on the evidence of the prior witness. In this case, the evidence relating to the invoices and letter was collateral—it might have been objected to when it was offered, as not pertinent to the issue, and being collateral matter, the testimony given concerning it by the plaintiff's own witness

1832.

 FRIEDLANDER
 v.
 LONDON
 ASSURANCE
 COMPANY.

cannot be contradicted by evidence subsequently called by the same party. *Ewer v. Ambrose (a)*.

Holt and Follett, in support of the rule. The established rule is that you may call witnesses to contradict, but not to discredit, a former witness. You cannot call a witness to a collateral fact, because that is merely discrediting the preceding witness. If the fact be material to the issue, the evidence, though contradictory, is allowable. The evidence offered was pertinent to the issue in the cause, and not matter merely collateral. This is an action on a policy of assurance, and the issue is whether or not certain goods that belonged to the plaintiff were on the premises previously to the fire. If the letter and invoices were fabricated, it is to be presumed that the goods were never sold, and if not sold, the plaintiff had them not, could not lose them by the fire, and could not recover for them from the defendants. It is most material whether or not the plaintiff was privy to the fabrication of the documents. These witnesses might have been called at the commencement of the cause to prove that these invoices were genuine, and surely they may be called afterwards to prove the same fact. *Ewer v. Ambrose (a)*; *Alexander v. Gibson (b)*; *Richardson v. Allen (c)*.

PARKE, J.—There is no dispute as to the law of the case. The only difficulty is the application of the law to the facts. It is clear that you may contradict a witness as to a fact material to the cause. The only question is, whether the facts here are collateral or material. With respect to the letter, if the plaintiff himself directed it to be written, that is not a collateral fact, as the plaintiff himself is concerned in it. With respect to the invoices, it struck

(a) 5 D. & R. 629; 3 B. & C.
 746.

(b) 2 Campb. N. P. C. 555.

(c) 2 Stark. N. P. C. 334.

me at first that as the invoices were said to have been fabricated in the presence of the shopman, and without the privity of the plaintiff, that it was matter collateral to the issue; but it now appears to me that it is material, as it was of consequence to inquire in whom the property of the goods upon the premises was vested.

1832.
FRIEDLANDER
v.
LONDON
ASSURANCE
COMPANY.

TAUNTON, J., and PATTESON, J., concurred.

DENMAN, C. J. having been counsel in the cause, gave no opinion.

Rule absolute for a new trial.

The KING v. the Inhabitants of LYDLINCH.

JOHN TUCKER, his wife, and two children, were removed, by an order of three justices, from the parish of Hilton, in the county of Dorset, to the parish of Lydlinch, in the same county. On appeal, the Court of Quarter Sessions confirmed the order, subject to the opinion of this Court upon the following case:—

By an indenture of lease, dated 22d December, 1754, *George Pitt*, lord of the manor of Hilton, in consideration of surrenders made by *William Corfe*, and by *Arthur Corfe* and his wife, of a dwelling-house and garden, and also in consideration of the rebuilding of the premises by *John Tucker* (the grandfather of the pauper), and of the sum of 1s. paid by him to *G. Pitt*, demised the dwelling-house and garden, with the appurtenances, to the said *John Tucker*, the grandfather, for the term of 99 years, (if the said *John Tucker* and *Elizabeth* his wife, and *Melliar*, their daughter, or either of them, should so long live,) under the yearly rent of 1s. The lease contained a proviso for re-entry on non-payment of the rent reserved, and a covenant from the lessee to pay the rent, to attend the Lord's Court, and do suit

The restriction upon the acquiring of a settlement by purchase, in 9 G. 1, c. 7, s. 5, requiring a consideration of 30*l.*, is limited to purchases for a money consideration.

1832.
 The King
 v.
 LYNCH.

and service there—to finish the rebuilding of the dwelling-house within two years, and to repair during the term. *Tucker*, the lessee, was grandson of *William Corfe*, and great nephew of *Arthur Corfe*. It did not appear that any pecuniary consideration passed from *Tucker*, the lessee, either to *William* or to *Arthur Corfe*. *Tucker*, the lessee, continued to inhabit the premises until his death, in the year 1818. It was found by the sessions that the premises were not of the value of 30*l.* when the house or cottage was rebuilt by *Tucker*, the lessee.

The question for the opinion of this Court is, whether *Tucker*, the lessee, obtained a settlement by estate in the parish of Hilton. If so, the pauper is derivatively settled therein, and the order of sessions is to be quashed, otherwise to be confirmed.

Barstow and *W. H. Watson*, in support of the order of sessions. By 9 Geo. 1, c. 7, s. 5, no person can acquire a settlement by virtue of any purchase of any estate, whereof the consideration of such does not amount to 30*l. bona fide* paid. This is a case within the purview of this statute. The word “purchase” is here used in contradistinction to descent, *Rex v. Warblington* (a). The consideration mentioned in the indenture is the rebuilding of the house. That is a valuable consideration, and it is the foundation of the grant. The amount of the consideration is not stated in the deed, but the Court of Quarter Sessions has found that the premises were not of the value of 30*l.* This was a purchase by *Tucker*, the lessee; the foundation of the grant was a valuable consideration, and the premises are under the value of 30*l.* He therefore did not acquire a settlement in Hilton. *Rex v. Upton* (b); *Rex v. Hornchurch* (c); *Rex v. Hatfield-Broad-Oak* (d); *Rex v. Ingletton* (e).

(a) 1 T. R. 241.

(b) 3 T. R. 231.

(c) 3 B. & Ald. 189.

(d) K. B. Easter T. 1832, MS.

(e) Barr. S. C. 360.

Jeremy, *contra*. This is not a purchase within the meaning of the statute of 9 Geo. 1. The deed is a family arrangement, and the lord of the manor is merely a medium for carrying that arrangement into effect; *Rex v. Marwood* (a); *Rex v. Tarrant-Launceston* (b); *Rex v. Charlton* (c).

1832:
The KING
v.
LYDLING.

Bond on the same side was stopped by the Court.

DENMAN, C. J.—This resembles the case of *Rex v. Tarrant-Launceston*. It is not a purchase within the meaning of the stat. of 9 Geo. 1, c. 7.

PARKE, J.—The statute only applies where the consideration mentioned in the conveyance is a money consideration.

TAUNTON, J.—To bring the case within the statute, the consideration in the deed of conveyance must be money only.

PATTESON, J. concurred.

Order of Sessions quashed.

(a) Barr. S. C. 386.

(b) Cald. 209.

(c) 2 Bott, 493; Barr. S. C.

813.

The KING v. CORDING.

THE defendant, *Cording*, was brought up to the Court of King's Bench, by virtue of a writ of *habeas corpus*, which had been obtained upon the motion of Sir James *Searlett*. The defendant had been committed to prison by Mr. *Ballantine*, upon a warrant, of which the following is a copy:—

The power of imprisonment given by the 14th sec. of 39 & 40 G. 3, c. 99, (the Pawnbrokers' Act,) in cases of wilful detention, does

not extend to the cases of embezzlement, loss, or damage, provided for by the 24th sec. *Semble*, that a pawnbroker is not liable to make compensation where the goods pledged have been destroyed by fire without his negligence or default.

1832.

The KING

v.

CORDING.

Warrant of
commitment.

"To all constables, &c. of the county of Middlesex, and to the governor of the House of Correction, at Cold Bath Fields, in the said county.

Gun pawned.

"Middlesex to wit.—Whereas on the 2d day of October, in the year of our Lord 1832, *George Courtney*, of Well-close-square, in the liberty of his Majesty's Tower of London, gentleman, informed me, *William Ballantine*, Esq., one of his Majesty's justices of the peace for the said county of Middlesex, that on the 11th day of January, in the year aforesaid, he pawned one gun, of which he was the real owner, for securing the sum of 21s., lent thereon by *John Masheder Cording*, of the parish of St. George, in the said county, pawnbroker, and the profit thereof, and that the said *George Courtney* had, within the space of one year after the pledging of the said gun, to wit, on the 28th

Tender.

day of September, in the year aforesaid, duly tendered unto the said *John Masheder Cording* the said sum of 21s., the principal money borrowed on the said gun, and the profit due to the said *John Masheder Cording*, according to the table of rates established by the act of parliament in such case made and provided, and thereupon demanded and required the said *John Masheder Cording* to deliver back the said gun to the said *George Courtney*, but that the said *John Masheder Cording* did, on the said 28th day of September, in the year aforesaid, at the said parish of Saint George, in the said county, unlawfully, and without showing reasonable cause for so doing, neglect and refuse to deliver back the said gun to the said *George Courtney*.

Refusal.

And whereas the said *John Masheder Cording* appeared before me, the said justice, on the said 2d day of October, in the year aforesaid, at the Thames Police-office, in the parish of St. John of Wapping, in the said county; and I, the said justice, proceeded to examine on oath, in the presence and hearing of the said *John Masheder Cording*, the said *George Courtney*, and also one *Charles Young*, a credible witness, touching the premises; and he produced before me the note or memorandum which had been given

Examination.

by the said *John Masheder Cording*, upon the pledging of the said gun, according to the direction of the act of parliament in such case made and provided, and proved a tender of the principal money due, and all profit thereon, to have been made as aforesaid to the said *John Masheder Cording*, within the said space of one year after the pledging of the said gun; whereupon the said *John Masheder Cording* stated that the said gun had been destroyed by fire on his premises. And whereas upon due consideration had thereof, it appeared to me, the said justice, that the said gun had been lost by the said *John Masheder Cording*, and I did thereupon, by a certain order under my hand and seal, bearing date the said 2d day of October, in the year aforesaid, allow and award the sum of 3*l.* 9*s.* to be a reasonable satisfaction to the said *George Courtney* for and in respect of the said gun, and did order the said *John Masheder Cording* forthwith to pay the said sum of 3*l.* 9*s.* to the said *George Courtney*, according to the form of the statute in such case made and provided. And whereas it appears to me, the said justice, on the oath of the said *George Courtney*, that the said *John Masheder Cording*, having had due notice of my said order, hath unlawfully neglected and refused to pay the said sum of 3*l.* 9*s.* to the said *George Courtney*, as a satisfaction for and in respect of the said gun. These are therefore to will and require you, the said constables and peace officers, forthwith to apprehend and convey the said *John Masheder Cording* to the said House of Correction; and you, the said governor of the said House of Correction, are hereby authorised and required to receive the said *John Masheder Cording* into your custody in the said House of Correction, and him therein safely to keep without bail or mainprize, until he shall pay the said sum of 3*l.* 9*s.*, the amount of satisfaction which I, the said justice, have adjudged to be reasonable for the value of the said gun so lost as aforesaid, to the said *George Courtney*, or be otherwise dis-

1834.

The KING
v.
CORDING.

Defence.

Order to re-
pay.

Notice of
order.

Commitment
until payment.

1682.

The King

v.

CORDING.

First objection—Case not within 14th section.

charged by due course of law. Given, &c., on the 7th November, &c.”

Sir J. Scarlett and Follett, for the prisoner. This is a warrant founded on the 39th and 40th Geo. 3, c. 99; two sections of which, the 14th (a) and the 24th (b), are supposed

39 & 40 G. 3, c. 95, (Pawn-brokers' Act), sect. 14.

(a) Which provides, that if any goods or chattels shall be pawned or pledged for securing any money lent thereon, not exceeding 10*l.*, and the profit thereof, and if within one year after the pawning or pledging thereof (proof having been made on oath or affirmation, and by producing the note or memorandum directed to be given by this act, before any justice or justices, of the pawning or pledging of any such goods, &c., within the said space of one year, or one year and three months, as the case may be), any such pawnor who was the real owner of such goods, &c., at the time of the pawning or pledging thereof, his executors, &c., shall tender unto the lender, his executors, &c., the principal money borrowed thereon, and profit, according to the table of rates by this act established; and the person who took such goods or chattels in pawn, his or her executors, administrators, or assigns, shall thereupon, without shewing reasonable cause for so doing to the satisfaction of such justice or justices, neglect or refuse to deliver back the goods, &c., so pawned, for any sum or sums not exceeding the said principal sum of 10*l.* to the person who borrowed the money thereon, his executors, &c., then on oath or affirmation, as afore-

said, thereof made by the pawnor, his executors, &c., or some other credible person, any justice, &c., for the county, &c. where the person took such pawn as aforesaid, his executors, &c. shall dwell, on the application of the borrower, his executors, &c., is and are hereby required to cause such person who took such pawn, his executors, &c., within the jurisdiction of the justice, &c., to come before such justice, &c., and such justice, &c., is and are hereby authorized and required to examine on oath or affirmation, as the case may require, the parties themselves, and such other credible person or persons as shall appear before him or them, touching the premises; and if tender of the principal money due, and all profit thereon, shall be proved by oath or affirmation to have been made (such principal money not exceeding ten pounds), to the lender thereof, his executors, &c., by the borrower of such principal money, his or her executors, &c., within one year, or one year and three months, as the case may be, after the said pawning or pledging of the goods, &c., then on payment by the borrower, his executors, &c., of such principal money, and the profit due thereon as aforesaid to the lender, his executors, &c., and in case the

to apply to a case of this description. This warrant cannot be supported either on the one section or on the other, or by construing both the sections together. The 14th section speaks of a re-delivery of the goods pawned. It relates,

1839.
The KING
v.
CORDING.

lender, his executors, &c., shall refuse to accept thereof, on tender thereof to him made by the borrower, his executors, &c., *before any such justice, &c.*, such justice, &c., shall thereupon, by order under his or their hand or hands, direct the goods, &c. so pawned, *forthwith* to be delivered up to the pawner, his executors, &c.; and if the person who shall have lent any principal sum or sums of money, not exceeding ten pounds on any goods, &c. pawned, his executors, &c. shall neglect or refuse to deliver up or make satisfaction for the goods, &c., which shall be so proved to the satisfaction of such justice, &c. to have been so pawned, as any justice, &c. shall order and direct, then any such justice, &c. shall, and is and are hereby authorized to commit the party so refusing to deliver up or make satisfaction for the same to the House of Correction, or some other public prison for the county, &c., wherein the offender shall reside or be convicted, there to remain without bail or mainprize, until he shall deliver up the goods, &c. so pawned, *and continuing redeemable* as aforesaid, according to the order of such justice, &c., or make such satisfaction or compensation as such justice, &c. shall adjudge reasonable for the value thereof to the party entitled to the redemption of such goods, &c. so pawned and continuing redeemable as aforesaid.

(b) Which provides, that if in the course of any proceedings before any such justice, &c. under this act, it shall appear or be proved to the satisfaction of the justice, &c. upon oath, or solemn affirmation, that any of the goods and chattels pawned as aforesaid have been sold before the time allowed by this act or otherwise, than according to the directions of this act, or have been embezzled or lost, or are become, or have been rendered of less value than the same were at the time of pawning or pledging thereof, *by or through the default, neglect, or wilful misbehaviour* of the person by (to) whom the same were so pledged or pawned, his executors, &c., agents or servants, then it shall be lawful for every such justice, &c., and he and they is and are hereby required, to allow and award a reasonable satisfaction to the owner of such goods, &c. in respect thereof, or of such damage, and the sum or sums of money so allowed or awarded, in case the same shall not amount to the principal and profit aforesaid, which shall appear to be due to any person with whom the same were so pledged or pawned, his executors, &c., shall be deducted out of the said principal and profit; and in all cases where the goods, &c. pawned shall have been damaged as aforesaid, it shall be sufficient for the pawner, his executors, &c., to pay or tender the money due upon the balance

Sect. 24.

1832.

The KING
v.
CORDING.

Second objection—No tender before magistrate of the money lent.

Third objection—No conviction.

therefore, only to goods which are in existence, and applies to the case of a wilful withholding by the pawnee, of pledges which it is in his power to hand over, and which, without giving any satisfactory reason, he refuses to deliver.

Another objection to this instrument is, that it is not proved, nor is it stated in the warrant, that a tender of the money lent by the pawnee was made in the presence of the justice. Until such tender be made, the justice has no power to direct the goods pawned to be delivered up to the pawner; and this step appearing to have been omitted, the subsequent proceedings were bad.

The warrant is also illegal, inasmuch as there was no conviction upon which it could be based. After the order to pay the 3*l.* 9*s.* had been made and disobeyed, the justice should have summoned the party before him, that he might have had an opportunity of explaining why he had refused to do as he was commanded, and then upon his non-appearance or failing to give a satisfactory reason for his non-compliance with the order, the justice might have convicted him of the disobedience, and committed him to prison. It cannot be said that the order itself was a sufficient conviction, because in the warrant it is expressly stated as the ground of commitment, that *Cording* had unlawfully refused to pay the money in pursuance of the order. It was for this disobedience and

after deducting out of the principal and profit as aforesaid, for the goods, &c. pawned, such reasonable satisfaction in respect to such damage, as such justice, &c. shall order or award, and upon so doing the justice, &c. shall proceed as if the pawner, his executors, &c. had paid or tendered the whole money due for the principal and profit aforesaid; and if the satisfaction to be allowed and awarded to the owner of such goods, &c. shall be equal to or exceed the principal

and profit aforesaid, then and in such case the person to whom the same were so pledged or pawned, his executors, &c. shall deliver the goods, &c. so pledged, to the owner thereof, without being paid any thing for principal or profit in respect thereof, and shall also pay such excess (if any) to the person entitled thereto, under the penalty of ten pounds, to be recovered and applied in manner hereinafter mentioned (*i. e.* by conviction and distress; sect. 26, 27).

contempt that he was committed, and yet it does not appear in the warrant that the magistrate was lawfully apprized of the contempt. There is nothing to shew that he was informed of it upon the oath of the other party, much less that *Cording* himself was examined touching his disobedience. He ought to have been lawfully convicted, *The King v. Rhodes (a)*; and the conviction should have been set out in the warrant.

1839.
The KING
v.
CORDING.

Nor is the present proceeding warranted by the 24th section; and that for several reasons. The goods were not "lost" by or through "*the default, neglect, or wilful misbehaviour*" of the person to whom they were pledged. These words must be read in conjunction with the word "lost" as well as with the words immediately preceding them; otherwise this absurdity would follow, that if an article were *partially* damaged by fire, the pawnee of the goods would not be entitled to compensation; if they were wholly destroyed, the value of the articles lost would be awarded to him. This is also the proper grammatical construction.

Fourth objection—Loss without default of pawnee.

Admitting that this section applies to goods lost, even lost without the default, neglect, and wilful misbehaviour of the pawnee, the magistrate in such cases is only authorized to award compensation in respect of the injury sustained; and the committal cannot be supported unless recurrence be had to the 14th section. The 24th section imposes a penalty of 10*l.* in case of refusal to comply with the order for compensation. That section, however, applies only to cases of embezzlement, loss, or damage, and gives the magistrate no power to commit. The two sections cannot be taken conjointly, *i. e.* the magistrate cannot derive from the 14th section a power to commit for offences described in the 24th section. The former section, it has been shewn, relates only to a withholding of pledges which are *in esse*, and which it is in the power of the pawnee to restore; and to this offence a

Fifth objection—Offences against 24th section, not punishable by imprisonment under 14th.

1832.

The King
 v.
Conning.

punishment is affixed. The latter section is applicable to cases of loss, damage or embezzlement, through negligence, &c. of the pawnee, and imposes an appropriate penalty. In each section a specific punishment is mentioned. It would therefore appear quite unreasonable to punish under the 14th for that which, if within the act at all, ranges itself under the 24th section.

Campbell, in support of the warrant. The question is, whether or not a pawnbroker is liable to make compensation to the owner in cases where goods pawned to him have been destroyed by fire. A pawnbroker is like a common carrier, an insurer of goods entrusted to his care: he receives a high rate of interest upon the money which he advances; and it would be therefore equitable that in case of fire or other accident, the loss should fall upon him; and, moreover, it was in his power to have secured himself by a policy of assurance. It seems to have been the intention of the legislature, in passing this act, that pawnbrokers should be subject to these liabilities. The act is very obscure; but it appears that it will be more consistent with the meaning of it to disjoin the words "lost" and "through default," &c.

Construing the 14th and 24th sections together, the magistrate had a power of committing. If the article be in existence, the order should be in the alternative, *i. e.* either to redeliver or to give compensation; but if the article be destroyed, it should be single, *i. e.* to give compensation only. It has been said that after this order is made, the pawnbroker should be summoned, should appear, and should be convicted of disobedience to the order, before the magistrate would be warranted in committing him. It might as well be said that in civil cases before a *ca. sa.* issued against a defendant, a *sci. fa.* should be served. As to the case of *The King v. Rhodes*, that was a case on the vagrant act, and merely determined that there should be trial before punishment.

1832.
 The KING
 v.
 CORDING.

DENMAN, C. J.—No subject of the king is to be restrained of his liberty without a good legal warrant being shewn for his imprisonment. I am of opinion that no such warrant is in this case shewn. A great variety of objections have been taken to this proceeding, and I am almost disposed to think that every one of those objections is good. It is, however, enough for me upon this occasion to select one objection (a) which is plainly good, and which therefore makes this warrant illegal. In my judgment there is no power of commitment whatever under the 24th section of the act, even supposing destruction by fire to be such a loss as is contemplated by that clause: for I think it requires proof the most clear, precise, and decisive, to convince one that the power given by the 14th section to the magistrate, to commit where the goods are contumaciously detained against the order of the magistrates, was intended to be applied to any case where the goods have been either lost without the default, neglect or wilful misbehaviour of the pawnbroker, or where in point of fact restitution cannot be made. It seems to me that the object of the two clauses is extremely different. The Court cannot *imply* the right of restraining the liberty of the subject. To carry words, importing the power of committal, from the one clause to the other, language the most clear and explicit should be shewn. I doubt whether the magistrate has drawn the right conclusion of facts when he says—"upon due consideration it appears to me that the gun was lost." The magistrate knows nothing of the history of the goods except what the pawnbroker states; and his statement is, that the gun was destroyed by fire on his premises. It is, however, unnecessary to consider or discuss that question; because, supposing the gun was lost through the default, neglect or wilful misbehaviour of the pawnbroker, the section of the act, which gives the remedy to the party damnified in that case, fines the pawnbroker in the penalty of 10*l.*, and does not contain any

(a) The fifth, *ante*, 41.

1832.

The KING
v.
CORDING.

power of committing him to prison. This warrant cannot therefore be supported.

PARKE, J.—I am entirely of the same opinion. It is not necessary to enter into the consideration of any of the objections urged against this warrant, except the one which has been adverted to by my Lord, and which is the substantial objection. We cannot see clearly that any power is given to magistrates to commit in cases of the non-payment of the sum of money awarded. The magistrate, by the 24th section, is directed to allow and award in case (amongst other things) of embezzlement and loss; but there is in that section no power to commit. I do not think we are at liberty to say that the legislature meant to import unto the 24th section the power of commitment give by the 14th section; for that power is evidently only intended to be given in cases in which the pawnbroker has the power of delivering up the goods and wilfully refuses to do so. It is reasonable to say that if he is guilty of the misconduct of not delivering up the goods when he has them in his power, or refuses in such a case to make compensation, that he should immediately be committed, and that perhaps without a conviction. It is a very different thing to say when the goods have been lost, that he shall be committed immediately on the nonpayment of the sum awarded, without any power of appeal. It seems to me, therefore, that we are not warranted in saying, from anything to be found in this act of parliament, that the legislature ever meant to give the magistrates the power of commitment in such a case as this. In conclusion, I wish to be understood as dissenting from the doctrine, I will not say laid down, but suggested (*a*), that pawnbrokers should be made responsible for losses by fire which have happened without their default or negligence.

Pawnbroker
not liable for
loss by acci-
dental fire.

TAUNTON, J.—I am of the same opinion with my Lord

(*a*) *Ante*, 43.

and my brother *Parke*, as to the objection to this warrant upon which they have delivered their opinions. I hold that the power of imprisonment, given by this 14th section, cannot by implication be transferred to the 24th section. That objection of itself is sufficient to dispose of this warrant. It is not necessary to declare any judicial or positive opinion upon any other of the objections which have been taken. I have, however, a very strong opinion that the words in the 24th section, "by or through the default, neglect or wilful misbehaviour of the person or persons," refer to the word "lost;" in other words, that no loss is within the 24th section unless it be a loss occasioned by or through the default, negligence or wilful misbehaviour of the pawnbroker: that a loss by fire therefore, not occasioned by any default, neglect or wilful misbehaviour of the pawnbroker, would not be a loss within the meaning of this statute. It is laid down by Lord *Holt*, in *Coggs v. Bernard* (a), that a pawnbroker is not answerable in case he be robbed of the goods pledged. If he be not

1832.

The KING
v.
CORDING.

(a) 2 *Ld. Raym.* 917; and see *Jones on Bailments*, 74—85, where this point is examined. See also *Sir J. Radcliff v. Davis*, *Yelverton*, 178, 9; *Kymer v. Suwercropp*, 1 *Campb.* 109; *Pothonier v. Dawson*, *Holt*, N. P. C. 383; *Lawton v. Newland*, 2 *Stark*. N. P. C. 73.

Judgment
in action of
debt deferred
because
pledge not
restored.

Where a defendant, in an action of debt for money lent, pleaded that she had deposited jewels with the plaintiff as a security for the repayment of the loan, which jewels the plaintiff had not returned, the Court refused to give judgment for the plaintiff in the action, saying that they had no power to award restitution of the deposit: *MS. Year Book*, Edw. I. in *Lincoln's Inn Library*. And see *School v. Salt*, 1 *Schoales & Lef.* 177.

The rule of the civil law may be collected from the following extracts:

"Si creditor, sine vitio suo, argentum pignori datum perdiderit, restituere id non cogitur. Sed si culpæ reus deprehenditur, vel non probat manifestis rationibus se perdidisse, quanti debitoris interest condemnari debet."—*Cod. lib. 4, tit. 24, lex 5.*

"Creditor pignora quæ hujusmodi casu interierint, præstare non compellitur; nec a petitione debiti summovetur, nisi inter contrahentes placuerit ut commissio pignorum liberet debitorem."—*Eod. tit. lex 6.*

"Pignus in bonis debitoris permanere, ideoque ipsi perire, in dubium non venit."—*Eod. tit. lex 9.*

Liability of
pawnee by civil
law.

Distinction between negli-
gence and loss
by accident distinctly proved.

Action of debt
not impaired by
loss of pledge,
unless so stipu-
lated.

Loss of pledge
borne by debtor.

1832.
 The KING
 v.
 COBBING.

liable in case of robbery, he would not be liable in case of accidental fire. I think the doctrine laid down by Lord *Holt* furnishes a key to the construction of this statute; for I apprehend that it was not the intention of the legislature to extend the liability of the pawnbroker to cases in which he would not have been liable at common law, and to give a summary remedy under circumstances under which even an action could not have been supported. I do not wish to be bound by this opinion; but at present I think that a loss occasioned by accidental fire is not a loss within the meaning of this statute.

Distinction
 between 14th
 and 24th sec-
 tions.

PATTESON, J.—I am of opinion that the warrant is bad on the ground stated by my Lord and the rest of the Court. I feel satisfied that the 24th section of the act does not authorize a magistrate to commit the parties in case of a loss. Such being my opinion, the other points are immaterial. We cannot incorporate the power of commitment given by the 14th clause with the 24th section. It is clear to me, from the words of the 14th and 24th sections, that the legislature has made a distinction between the cases where the goods are capable of being delivered up, and where they are not in existence. The order under the 14th section must be in the alternative, that is, to deliver up or make satisfaction. It seems to me, therefore, that the power of commitment in that section relates only to the case of a wilful refusal to deliver up goods which the pawnbroker has the power of delivering up.

The defendant discharged out of custody.



The KING v. The Inhabitants of RICKINGHALL-SUPERIOR.

1832.

THOMAS CHURCHYARD, his wife, and eight children, were removed from the parish of Rickingham-Superior, in the county of Suffolk, to the parish of Worham, in the same county. Upon appeal the Court of Quarter Sessions quashed the order, subject to the opinion of this Court upon the following case :

The respondents proved a *prima facie* settlement in the appellant parish, upon which the appellants proved that at Lady Day, 1828, the pauper, who was a cordwainer, hired a dwelling-house in the respondent parish, at the yearly rent of 9*l.* 9*s.*, from the ensuing Michaelmas, but he immediately entered into the occupation, and at the Michaelmas paid half a year's rent. He continued to occupy the dwelling-house under such hiring from Michaelmas, 1828, to Michaelmas, 1829, and paid rent for the same at Michaelmas, 1828: he likewise hired of the same landlord, and occupied from the same Michaelmas, 1828, to Michaelmas, 1829, at the rent of 1*l.* 5*s.*, a room which he used as a shop; the room being part of another dwelling-house in the same parish, and distant about four yards from the house in which the pauper lived, and he duly paid rent for the same. This room had an internal communication with such dwelling-house by a door, which door was locked on the pauper's going into occupation. It had also an external communication with the street by a door, by which the pauper entered it.

The sessions have found the room to be a *separate and distinct building*.

The question for the consideration of the Court is, whether since the passing of the 6 Geo. 4, cap. 57, a settlement can be gained by renting a dwelling-house at the rent of nine guineas, and a separate and distinct building in the same parish at the rent of 1*l.* 5*s.*

A shop held jointly with an adjoining house, with which it has an internal communication, is not to be considered as a distinct and separate building.

Where, upon a special case, facts are stated which warrant the judgment of the court below, but that court has drawn an inference which is not warranted by the statement, the order will be confirmed without sending the case back to be re-stated.

1887.

 The King
 v.

CORRING.
 First objection—Case
 not within
 14th section.

charged by due course of law. Given, &c., on the 7th November, &c.”

Sir J. Scarlett and Follett, for the prisoner. This is a warrant founded on the 39th and 40th Geo. 3, c. 99; two sections of which, the 14th (a) and the 24th (b), are supposed

39 & 40 G. 3,
 c. 95, (Pawn-
 brokers' Act),
 sect. 14.

(a) Which provides, that if any goods or chattels shall be pawned or pledged for securing any money lent thereon, not exceeding 10*l.*, and the profit thereof, and if within one year after the pawning or pledging thereof (proof having been made on oath or affirmation, and by producing the note or memorandum directed to be given by this act, before any justice or justices, of the pawning or pledging of any such goods, &c., within the said space of one year, or one year and three months, as the case may be), any such pawnor who was the real owner of such goods, &c., at the time of the pawning or pledging thereof, his executors, &c., shall tender unto the lender, his executors, &c., the principal money borrowed thereon, and profit, according to the table of rates by this act established; and the person who took such goods or chattels in pawn, his or her executors, administrators, or assigns, shall thereupon, without shewing reasonable cause for so doing to the satisfaction of such justice or justices, neglect or refuse to deliver back the goods, &c., so pawned, for any sum or sums not exceeding the said principal sum of 10*l.* to the person who borrowed the money thereon, his executors, &c., then on oath or affirmation, as afore-

said, thereof made by the pawnor, his executors, &c., or some other credible person, any justice, &c., for the county, &c. where the person took such pawn as aforesaid, his executors, &c. shall dwell, on the application of the borrower, his executors, &c., is and are hereby required to cause such person who took such pawn, his executors, &c., within the jurisdiction of the justice, &c., to come before such justice, &c., and such justice, &c., is and are hereby authorized and required to examine on oath or affirmation, as the case may require, the parties themselves, and such other credible person or persons as shall appear before him or them, touching the premises; and if tender of the principal money due, and all profit thereon, shall be proved by oath or affirmation to have been made (such principal money not exceeding ten pounds), to the lender thereof, his executors, &c., by the borrower of such principal money, his or her executors, &c., within one year, or one year and three months, as the case may be, after the said pawning or pledging of the goods, &c., then on payment by the borrower, his executors, &c., of such principal money, and the profit due thereon as aforesaid to the lender, his executors, &c., and in case the

to apply to a case of this description. This warrant cannot be supported either on the one section or on the other, or by constraining both the sections together. The 14th section speaks of a re-delivery of the goods pawned. It relates,

1838.

The King
v.
CORDING.

lender, his executors, &c., shall refuse to accept thereof, on tender thereof to him made by the borrower, his executors, &c., *before any such justice, &c., such justice, &c.,* shall thereupon, by order under his or their hand or hands, direct the goods, &c. so pawned, forthwith to be delivered up to the pawner, his executors, &c.; and if the person who shall have lent any principal sum or sums of money, not exceeding ten pounds on any goods, &c. pawned, his executors, &c. shall neglect or refuse to deliver up or make satisfaction for the goods, &c., which shall be so proved to the satisfaction of such justice, &c. to have been so pawned, as any justice, &c. shall order and direct, then any such justice, &c. shall, and is and are hereby authorized to commit the party so refusing to deliver up or make satisfaction for the same to the House of Correction, or some other public prison for the county, &c., wherein the offender shall reside or be convicted, there to remain without bail or mainprize, until he shall deliver up the goods, &c. so pawned, *and continuing redeemable* as aforesaid, according to the order of such justice, &c., or make such satisfaction or compensation as such justice, &c. shall adjudge reasonable for the value thereof to the party entitled to the redemption of such goods, &c. so pawned and continuing redeemable as aforesaid.

(b) Which provides, that if in Sect. 24. the course of any proceedings before any such justice, &c. under this act, it shall appear or be proved to the satisfaction of the justice, &c. upon oath, or solemn affirmation, that any of the goods and chattels pawned as aforesaid have been sold before the time allowed by this act or otherwise, than according to the directions of this act, or have been embezzled or lost, or are become, or have been rendered of less value than the same were at the time of pawning or pledging thereof, *by or through the default, neglect, or wilful misbehaviour* of the person by (to) whom the same were so pledged or pawned, his executors, &c., agents or servants, then it shall be lawful for every such justice, &c., and he and they is and are hereby required, to allow and award a reasonable satisfaction to the owner of such goods, &c. in respect thereof, or of such damage, and the sum or sums of money so allowed or awarded, in case the same shall not amount to the principal and profit aforesaid, which shall appear to be due to any person with whom the same were so pledged or pawned, his executors, &c., shall be deducted out of the said principal and profit; and in all cases where the goods, &c. pawned shall have been damaged as aforesaid, it shall be sufficient for the pawner, his executors, &c., to pay or tender the money due upon the balance

1832.

The King
v.

MATTERSEY.

Privy of
overseers to
fraudulent
removal.

fraudulently or collusively removed to another parish, the child will not have a settlement where it is born. [*Denman*, C. J. That is the case where the fraud or collusion is practised by the parish officers. Here, it does not appear that the overseers were at all cognizant of the fraudulent removal.] *The King v. St. Nicholas, Leicester* (a), is supposed to be an authority for the position that the fraud must be practised by the parish officers, in order to vitiate the settlement; but that case was determined on the decision in *Villa de Tewkesbury v. Villam de Twyning* (b), which is not an authority for that point. It does not appear that the parties removing the pauper in that case were parish officers. [*Taunton*, J. From 1 *Nolan*, 324, it appears that the persons who removed the woman were the parish officers.] The report in *Bulstrode* has not a single word relating to parish officers. *Masters v. Child* (c), may be relied upon on the other side; but there stress was laid on the circumstance of the woman's coming accidentally into the parish. If it be held that a parishioner, with a view to relieve himself from the payment of the rates, may remove a woman likely to become chargeable, a wide door for fraud will be opened. Suppose a parish divided amongst a small number of occupiers; they have only to take care that the woman be removed by one who is not a parish officer, and they will then fraudulently, and yet with impunity, relieve themselves from a burthen which ought properly to fall upon them.

Second
point—
Extra-paro-
chiality.

Then supposing the fraud to be sufficient to fix the settlement in *Mattersey*, if the place to which the mother was removed had been infra-parochial, the circumstance of its being extra-parochial can make no difference. The place of birth being extra-parochial, there can be no removal to the place of birth from any parish in which the pauper may happen to become chargeable. That parish is therefore defrauded to precisely the same extent as if the removal during pregnancy had been made to their parish instead of being made to a place to which they cannot remove.

(a) 9 B. & C. 889; 4 Dowl. & R. 462.

(b) 1 Bulst. 349.

(c) 3 Salk. 66.

Waddington and Knowles contra were stopped by the Court.

1832.

The KING
v.

MATTERSEY.

Bastard, settled where
born.

DENMAN, C.J.—This order must be quashed. The general rule is, that an illegitimate child must be supported by the parish where it is born. That rule must take effect here. Nothing is stated in this case to shew that the parish officers were parties to the fraud; and no case has been decided in which the fraud of a private individual has been holden to have the effect of preventing the settlement of an illegitimate child in the place of its birth. We could not, in my opinion, originate a more fertile source of litigation than that which we should be opening by a decision that it is the same thing whether the fraud be committed by a parish officer or by a parishioner. The exceptions to the general rule have already been carried far enough.

PARKE, J. concurred.

TAUNTON, J.—The case in *Salkeld* was decided on the ground that the woman had been fraudulently removed by the parish officers from the place of her settlement. Here it does not appear that the mother was settled in the parish from which she was removed. It is true that she had lived with her master within the parish for eight years, but it by no means follows that she had gained a settlement there. Independently of this consideration I should however hold that the order of sessions ought to be quashed. The general rule is, that an illegitimate child is settled in the place of its birth; and the present case does not fall within any of the exceptions.

PATTESON, J. concurred.

Order of Sessions quashed.

GODSON v. SANCTUARY.

1833.

Under a *fi. fa.* upon a judgment founded on a warrant of attorney, the sheriff seized at eleven o'clock on the 13th of August; a commission of bankrupt issued against the debtor at a later hour on the 13th of October, in the same year. The sale took place subsequently to the issuing of the commission.

It was held,
1st, That the seizure was a "levying" within 6 Geo. 4, c. 16, s. 81.
2dly, That more than two months had elapsed between the seizure and the issuing of the commission.
3dly, That the execution was not within the 108th section.

THIS was an action on the case against the defendant, as sheriff of Sussex, for a false return of *nulla bona* to a writ of *fi. fa.* issued at the suit of the plaintiff, against *Alexander Weller*. Plea, not guilty. At the trial at the sittings at Westminster, after Trinity term, 1832, before Lord Tenterden, C. J., a verdict was found for the plaintiff, damages 170*l.* 10*s.*, subject to the opinion of this Court upon the following case:—

On 12th August, 1830, a judgment was signed on a warrant of attorney, dated the 4th of the same month, by the plaintiff, against *Alexander Weller*; and on the same day a writ of *feri facias* was issued thereupon, directed to the defendant as sheriff of Sussex, indorsed to levy 170*l.* 10*s.*, besides &c.; which writ was delivered to the defendant to be executed.

The sheriff issued the warrant, in pursuance of which his officer, shortly before eleven in the forenoon of the 13th of August, entered the premises of *Weller*, and took possession of his goods. Here *Weller* remained ten or twelve days, holding such possession, when he sold enough to raise the above sum of 170*l.* 10*s.*, with the poundage and expenses, and received the amount.

On the 13th October, 1830, between twelve and one o'clock, a commission issued against *Alexander Weller*, under which he was duly found and declared a bankrupt, upon an act of bankruptcy committed in June, 1830; and the assignees having indemnified the sheriff, the money was paid over to them, and a return of *nulla bona* was filed.

First point.

Hutchinson, for the plaintiff. At the trial two points were made on behalf of the defendant. 1st, Whether the seizure of the goods by the sheriff was a levying of an execution within the meaning of the 81st sec. of 6 Geo. 4, c. 16, the goods having been seized but not sold? And

secondly, whether, supposing the seizure to be a levying within the meaning of that section, two months had in this case elapsed between the seizure and the issuing of the commission, the seizure taking place on the 13th day of August, and the commission issuing on the 13th day of October?

1832.

GODSON
v.

SANCTUARY.
Second point.

As to the first point—The 81st section of 6 *Geo.* 4, c. 16, enacts, that all executions and attachments against the goods and chattels of such bankrupt, *bonâ fide* executed or levied more than two calendar months before the issuing of such commission, shall be valid notwithstanding any prior act of bankruptcy. The words of the section are in substance the same as the 2d section of 49 *Geo.* 3, c. 121. The authorities upon the latter statute will therefore apply. The property was divested out of the bankrupt by the seizure; *Clerk v. Withers* (a). But assuming that all property is not divested out of the bankrupt by the seizure, yet, as between the execution creditor and the sheriff, the creditor is entitled to the preference; *Stead v. Gascoigne* (b). The sale being once made, no subsequent act can overreach the execution; *Cole v. Davies* (c). [Parke, J. Does not this case come under the 108th section, being a judgment upon a warrant of attorney?] The judgment is founded upon a warrant of attorney, but we do not seek to claim under the bankruptcy: we were not creditors at the time of the act of bankruptcy. *Wymer v. Kemble* (d) is an authority to shew, that where the seizure is made and the sale effected before the act of bankruptcy, the creditor suing out execution does come within the 108th section. As to the second objection, viz. that two months have not elapsed between the seizure and the act of bankruptcy, all the authorities are one way, and establish this rule or principle, that where time is to be computed from an act done, the day on which such act is done is to be included in the

First point—
Seizure of
goods, a "levy-
ing" in execu-
tion under 6
Geo. 4, c. 16,
s. 81.

Third point—
(suggested by
Court) Whe-
ther 108th sec-
tion applies to
cases within
81st.

Second
point—
Mode of cal-
culating the
two months,
under 6 *Geo.* 4,
c. 16, s. 81.

(a) 2 Lord Raym. 1072; 1 Salk. 322.

(b) 8 Taunt. 527.

(c) 1 Lord Raym. 724.

(d) 6 B. & C. 479.

1882.

GODSON
v.

SANCTUARY.

computation; *Rex v. Adderley* (a), *Glassington v. Rawlins* (b), *Castle v. Burditt* (c). The Court will also take notice of a fraction of day, if it be necessary, *Sadler v. Leigh* (d), *Thomas v. Desanges* (e), *Ex parte Farquhar* (f). The seizure took place at eleven o'clock on the 13th of August; two months must have expired before the 13th of October.

First point,
abandoned.

W. Clarkson contra. After the case of *Giles v. Grover* (g), which underwent so much discussion in the House of Lords, it cannot be contended that the seizure is not a levying within the meaning of the Bankrupt Act.

Second point.

Secondly, two months have not elapsed between the seizure and the issuing of the commission of bankrupt. The seizure took place on the 13th of August, the commission issued on the 13th of October. There cannot be two thirteenths in one month; and that proposition must be made out, if the position be correct, that two months have in this case elapsed between the seizure and the issuing of the commission. In *Cowie v. Harris* (h), Lord *Tenterden* says, "Both days cannot be reckoned inclusively, so as to make March the 14th not more than two calendar months before May the 14th" (the date of the commission in that case). The judgment of the Court upon the first question considered by them in *Hardy v. Ryle* (i), is applicable. That was an action for false imprisonment. The plaintiff had been discharged out of custody on the 14th of December, and the action was commenced on the 14th of June. One question submitted to the Court was, whether the action had been commenced within six calendar months; and the Court held that the action was brought within that period, and excluded from their computation the 14th of December; and Mr. J. *Bayley*, in delivering the judgment of the Court, said, that the

(a) 2 Dougl. 463.

(b) 3 East, 407.

(c) 3 T. R. 623.

(d) 4 Campb. 195, 197.

(e) 2 Barn. & Ald. 586.

(f) 1 Mont. & Mac. 7.

(g) 9 Bingham. 128.

(h) 1 Mood. & Malk. 141.

(i) 4 Mann. & Ryl. 205; 9 B. & C. 603.

case should receive the same construction as if the goods had been seized under a magistrate's warrant.

Then as to the question, which was thrown out by the Court (a), whether this is a case within the purview of the 108th section: the plaintiff is not entitled to the proceeds of the sale, being a creditor, having security within the meaning of the 108th section of the Bankrupt Act. The case of *Wymer v. Kemble* is distinguishable from the present, inasmuch as there the sale was completed before the act of bankruptcy. *Notley v. Buck* (b) is expressly in point. In that case the seizure was made before the commission issued, the goods were sold subsequently, and it was held that the assignees of the bankrupt were entitled to the proceeds of the sale. This point was not decided in either *Taylor v. Taylor* (c), or in *re Washbourn* (d).

1832.
Gopson
v.
SANCTUARY,
Third point.

Hutchinson, in reply. The first point, that the seizure is not to be considered a "levying" within the meaning of the 81st section, is abandoned. First point.

Upon the second point raised at the trial, nothing has been adduced to shake the authority of the cases cited, as to the rule determining the mode of computing of time; the case of *Ex parte Furquhar* is decisive on this point. Second point.

With respect to the argument raised on the 108th section, the plaintiff was not a creditor at the time the execution issued, as the sale was before the issuing of the commission. After the sale, and before the return of the writ, the sheriff might have been sued by the plaintiff (e). Third point.
The 81st and 108th sections must be construed together, and the words of the former must be held to override the latter. The case is plainly within the 81st section; and the plaintiff is entitled, unless his right is taken away by express words in the 108th section, the meaning of which section must be allowed to be obscure.

(a) *Ante*, 53.

(b) 2 Mann. & Ryl. 68; 8 B. & C. 160.

(c) 5 B. & C. 392; 8 Dowl. & Ryl. 159.

(d) 2 Mann. & Ryl. 374; 8 B. & C. 444.

(e) *Vide* *Perkinson v. Gilford*, Cro. Car. 539. See also 2 Wms. Saund. 343.

1832.

GODSON
v.

SANCTUARY.

Computation
of time.Rights of cre-
ditor under
81st section
not divested
by 108th.

DENMAN, C. J.—Two questions were submitted to the Court in this case: First, whether the seizure of the goods by the sheriff was a “levying” within the meaning of the 81st section of the Bankrupt Act, 6 Geo. 4? Secondly, whether two months in this case had elapsed between the seizure of the goods by the sheriff and the issuing of the commission? The first point has been abandoned, in my opinion very properly. Then as to the second point, the language of the 81st section alone, without any authority, would lead the Court to inquire the time of the day when the seizure was made. The authorities are, however, all one way, and there is no doubt that two months in this case did elapse before the issuing of the commission. The case of *Ex parte Farquhar* (a) underwent much discussion, and after great consideration was confirmed by the Chancellor. The circumstances of that case are similar to this. It has been contended, that by the 108th section the plaintiff was deprived of the proceeds of the sale. The words of the 108th clause are not, in my opinion, sufficiently explicit to divest the right of the creditor. The words of that section are large and comprehensive; it is therefore the more necessary, in construing them, in some measure to limit their operation.

Computation
of time.

PARKE, J.—I am of opinion that the plaintiff in this case is entitled to recover. The first question which is raised is, whether the seizure was a levying more than two months before the issuing of the commission. That question has been decided upon the 21 Jac. 1, c. 19, and the stat. of 5 Geo. 2. The same construction must be put upon the words of this statute. The next question is, whether more than two calendar months had elapsed between the seizure of the goods and the issuing of the commission. The day on which the levy was made must be reckoned. In this case, therefore, more than two ca-

(a) 1 Mont. & Mac. 7; *ante*, 33.

lendar months had elapsed at any time on the 13th of October. The case *Ex parte Farquhar*, which was confirmed on appeal by the Lord Chancellor, is an authority to shew that this is the right mode of computing the time. One way of trying the question is by supposing that a single day instead of two months had been the time mentioned in the statute. Then if goods had been seized on the 13th of the month, and the commission had issued on the 14th, the seizure would have been made more than one day before the issuing of the commission. There is no doubt that the Courts, in cases of this description, will take into computation the fraction of a day. I am therefore of opinion that, under either view of the case, the levy took place more than two months before the issuing of the commission. Then as to the effect of the 108th section, it appears to me that that section applies only to judgments upon which execution has been sued out and seizure made within two calendar months before the issuing of the commission. The legislature evidently intended that the 81st section should apply to all executions.

1832.

 GODSON
 v.
 SANCTUARY.

81st section
 not controlled
 by 108th.

TAUNTON, J.—I am of the same opinion. There is abundance of authority to shew that the law acknowledges a fraction of a day. The question here is, whether between eleven o'clock on the 13th of August and one o'clock on the 13th of October more than two months had elapsed. It was law in Lord *Coke's* time, that if a man was born on the 25th of the month he became of age on the 24th, therefore on the 25th he must be more than 21. Here I say by analogy that more than two months had elapsed on the 13th, without considering the fraction of a day. A question has been raised as to whether the 81st section controls the 108th. The language of the 81st section is general; unless, therefore, the 108th section applies to the execution in this case, the seizure is protected by the 81st. I think the 108th section applies only to such executions as are not within the protection of the 81st section, that is, such

Computation
 of time.

81st section
 general, 108th
 limited.

1832.

Gopson
v.
SANCTUARY.

executions as have been levied less than two months before the issuing of the commission. If some limitation were not placed upon the words of the 108th section, there would be no period of time within which an execution founded upon a warrant of attorney would be incapable of being disturbed.

Execution
levied.

Fraction of a
day.

Cases within
81st section
not affected
by 108th.

PATTERSON, J.—I am entirely of the same opinion. There are three questions: First, whether by seizure of the goods the execution was *levied*, within the meaning of the 81st section? The second question is, whether more than two months had elapsed between the seizure and the issuing of the commission? Thirdly, whether the execution in this case is protected by the 81st section? The first point has been properly given up in the argument. As to the second point, I agree with my Lord, that by the words of the act the precise time of the execution must be ascertained; but the authorities which have been cited are quite decisive in shewing that the day on which the seizure was made must be taken into the computation. As to the third point, it is enough to say that the 108th section does not apply to any case protected by the 81st section. This act is very obscure, and has given rise to much more litigation than almost any other act of parliament that ever was framed.

Postea to the Plaintiff.

The KING v. ROBERT OAKLEY and others.

A conviction
for a forcible
detainer under
8 H. 6, c. 9,
must shew an *unlawful* entry as well as a forcible detainer.

THE defendant had been convicted by *George Pearse*, *Edmund Burke Lewis*, and *James Reed*, three justices of whether the holding over by a termor after the expiration of his term, is, constructively, an unlawful entry, *guards*.

the peace for the county of Bedford, of a forcible detainer of a dwelling-house at Leighton Buzzard, in the county of Bedford. The following is a copy of the conviction:—

“ Bedfordshire to wit. Be it remembered, that on the 11th day of February, in the second year &c., at the parish of Leighton Buzzard, in the county of Bedford, *Edward Penfold*, Esquire, complaineth to us, *George Pearse*, Esquire, *Edmund Burke Lewis*, clerk, and *James Reed*, clerk, justices of our lord the king, assigned &c., that *Robert Oakley*, late of the parish of Leighton Buzzard, *William Toms*, late of &c. labourer, *John Robinson*, late of &c. labourer, *George Hart*, late of &c. shoemaker, and *William Fox*, late of &c. labourer, into and upon the mansion-house of him the said *Edward Penfold*, called Heath House, and divers outhouses to the same mansion-house belonging and appertaining, situate in the township of Heath-and-Reach, in the parish of L. B. aforesaid, in the county of B. aforesaid, and also into and upon divers closes, pieces or parcels of land, to wit, fifty acres of inclosed land, and sixty acres of open and uninclosed land of him the said *Edward Penfold*, situate at Heath-and-Reach aforesaid, then lately *did enter*, whereof the said *Edward Penfold* was tenant by copy of court-roll for the term of his natural life, and the same mansion-house, &c., from him the said *Edward Penfold*, *unlawfully*, with strong hand and armed power, *do hold and from him detain*, against the form of the statute in that case made and provided; whereupon the said *Edward Penfold* then, to wit, on the said eleventh day of February, at the parish of L. B. aforesaid, prayeth of us, so as aforesaid being justices, that a due remedy be provided to him in this behalf, according to the form of the statute aforesaid. Which complaint and prayer by us the aforesaid justices being heard; We the aforesaid *G. P.*, *E. B. L.*, and *J. R.*, justices as aforesaid, to the mansion-house, outhouses and closes of land aforesaid, personally have come, and do now here find and see the aforesaid *R. Oakley*, *W. Toms*, *J. Robin-*

1832.

The KING
v.


OAKLEY.

CONVICTION.

Information.

Prayer.

Coming of
justices,Finding of
forcible de-
tainer,

1832.  The KING v. OAKLEY.	<p><i>son, G. Hart, and W. Fox, the aforesaid mansion-house, outhouses and closes of land, with force and arms unlawfully with strong hand and armed power, detaining, against the form of the statute in such case made and provided, according as he the said E. Penfold so as aforesaid hath unto us complained. Therefore it is considered by us, the aforesaid justices, that the aforesaid R. O., W. T., J. R., G. H., and W. F., of the detaining aforesaid by strong hand, by our own proper view, now here as aforesaid had, are convicted and every of them is convicted according to the form of the statute aforesaid. Whereupon we, the justices aforesaid, upon every of them the said R. O., W. T., J. R., G. H., and W. F., do set and impose severally a fine of fifty pounds of lawful money of Great Britain, to be paid by them and every of them severally to our said sovereign lord the king for the said offences, and do cause them and every of them to be now here arrested, and the same R. O., W. T., J. R., G. H., and W. F., being convicted, and every of them being convicted upon our own view of the detaining with strong hand, as is aforesaid by us the aforesaid justices, are committed, and every of them is committed, to the gaol of our said lord the king at Bedford, in the county of B. aforesaid, being the next gaol to the mansion-house and premises aforesaid, there to abide respectively until they shall have paid their several fines respectively to our said lord the king for their respective offences aforesaid. Concerning which the premises aforesaid, we do make this our record. In witness whereof, &c."</i></p> <p><i>This conviction was removed by a writ of certiorari into the Court of King's Bench.</i></p>
Judgment.	
Fine.	
Commitment.	
Record.	
Certiorari.	

Adolphus now moved that the conviction be quashed: 15 R. 2, c. 2. The justices have proceeded on the statute of 15 *Rich.* 2, c. 2, but that statute only relates to a forcible detention of land after a forcible entry, and in this conviction it is not stated that there had been such a forcible entry by the

défendants. Nor can the conviction be supported upon the statute of 8 *Hen.* 6, c. 9. In the first place, the magistrates cannot proceed upon their own view by virtue of that statute; for that statute directs the justices to make a precept to the sheriff, and to require him to return a jury, and the jury are to inquire of the entry; and in the second place, this statute applies only to a forcible detainer after an unlawful entry.

Lloyd, contra. At common law a man who attempted to regain possession of his own land by force, was guilty of a misdemeanor (*a*). Forcible entries upon lands and tenements, and forcible detainers, have been made offences by several statutes. The statutes are, 5 *Rich.* 2, c. 7; 15 *Rich.* 2, c. 2; 8 *Hen.* 6, c. 9; 31 *Eliz.* c. 11; and 21 *Jac.* 1, c. 15. The statute of 5 *Rich.* 2 enacts, that none thenceforth make entry into any lands or tenements, but in cases where entry is given by law; and in that case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner. This statute provided merely for forcible entries, and left the party peaceably ejected to the course of proceeding at common law, by indictment or by real action. The statute of 15 *Rich.* 2 gave a more summary mode of proceeding in case of forcible entries. It enacted, that the previous statute should be enforced, and added, that "at all times that such forcible entries be made, and complaint thereof come to the justices of the peace or to any of them, the same justices or justice take sufficient power of the county, and go to the place where the force is made; and if they find any that hold such place forcibly, after such entry made, they shall be taken and put into the next gaol, there to abide convict by the record of the same justices or justice, until they have made fine and ransom to the king; and that all the people of the county, as well the sheriff as others, shall be attendant upon the same justices to go and assist the

1832.

The KING
v.
OAKLEY.

8 *H.* 6, c. 9.
First point—
Whether magistrates may proceed upon their own view.
Second point—
Whether statute applies to forcible detainer after lawful entry.

5 *R.* 2, c. 7.15 *R.* 2, c. 2.

Posse comi-
tatus.

(*a*) *Rex v. Storr*, 3 Burr. 1698; *King v. Wilson*, 8 T. R. 357.

1884.

The KING
v.
OAKLEY.

8 H. 6 c. 9.

Sect. 1.

Sect. 2.

Sect. 3.

31 El. c. 11.

same justices to arrest such offenders; upon pain of imprisonment, and to make fine to the king." Neither of the statutes of *Richard* gave any redress where the entry had happened to be *peaceable* and the land was *detained* by force, nor where (although the entry had been forcible) the parties had quitted the premises before the arrival of the magistrates. The statute of 8 *Hen.* 6 was, therefore, passed; and that statute, after reciting that the statute of 15 *Rich.* 2 did not extend to entries into tenements in a peaceable manner, and after holden with force, declares that the former statutes shall be duly executed, and "in addition thereto, that henceforth where any doth make any forcible entry into any lands, tenements, or other possessions, or hold them forcibly after complaint thereof made within the same county where such entry is made, to the justices of the peace, or to one of them, by the party grieved, the justice or justices so warned within a convenient time shall cause the said statute to be duly executed, and that at the costs of the party so grieved."

The next section of this act provides, that though such persons making such entries be present, or else departed before the coming of the justices, they shall have power to inquire *by the people of the same county*, as well of them that make such forcible entries on lands, as of them which hold the same by force. And the justices shall *reseise* the lands or tenements so entered or holden as aforesaid, and shall put the party so put out in full possession of the same lands or tenements so entered or holden as aforesaid. The next section regulates the mode of summoning the jury, and the last section declares that none shall be endamaged by force of the statute who have continued in possession for three years.

The act of 31 *Eliz.* merely explained and enforced this last proviso of the statute of *Hen.* 6. Upon the construction of these statutes, it was holden, that if a copyholder be ousted, and the lord disseised, and such ouster and disseisin be found in an indictment for a forcible

1833.

 The KING
 v.
 OAKLEY.

entry, the Court might award a restitution of possession. But it was a question whether restitution could be made to a copyholder where he had been ousted by his lord; as the words in the statute are, that the justices shall *reaise* the land. To remove this doubt, the statute of *Jac. 1* was passed, which enacted, that the justices should 21 *Jac. 1*, c. 15. have power and authority to give restitution of possession unto tenants for terms for years, and tenants by copy of court-roll, of land by them so holden, which should be entered upon by force, or holden from them by force (a). The statute of *Hen. 6*, construed with 15 *Rich. 2*, which it recites, gave two modes of proceeding. The justices might either proceed summarily upon their own view, or they might summon a jury to inquire into the offence. In this case they have adopted the former course. [*Patterson, J.* It must be assumed that the entry in this case was lawful.] The precedents for a forcible detainer are in this form (b). [*Denman, C. J.* Suppose that the copyholder had let the land for a year, and that the lessee had entered and held possession by force, might not every word of the conviction be true?] The parties convicted might have traversed the entry, and the justices might then have summoned a jury (c). A forcible detainer necessarily implies a previous unlawful expulsion. [*Parke, J.* There should have been averments in the conviction to bring the case within the purview of the statute; it is not stated that the house at the time of the entry was the property of *Penfold*.] The words in the conviction are, the mansion-house of *him* the said *Penfold*. This would be a sufficient averment of possession in a declaration; and the words in the precedent, in Lord Raym. are, “domum mansionalium ipsius E.” (d) [*Taunton, J.* It is not averred that the entry

(a) Dalton's Justice, cap. 44, 125, 126; Hawkins's Pleas of the Crown, 8th ed. 495—499.

(b) Dalton's Just. c. 182; 2 Ld. Raym. 1514; 2 Burn's Justice, 803 (26th ed.)

(c) *Layton's case*, 1 Salkeld, 353.

(d) 2 Lord Raym. 1514; 3 Ld. Raym. 360.

1833.

 The King
 v.
 OAKLEY.

was unlawful.] If a tenant for years held over, he would be guilty of a forcible detainer. The statute of *Hen. 6* applies to cases where the original entry is lawful, but the party holds the premises with force after his title has expired. That statute makes the unlawful and forcible detention of land an offence.

Adolphus in reply. The statute 8 *Hen. 6* only applies to a forcible detainer after a forcible entry. The statutes of *Hen. 6*, *Eliz.*, and *Jac. 1*, all point at the summoning of a jury; they enact, that restitution shall follow the verdict; and they all proceed on the supposition, that an indictment will be preferred. Here it is not stated that the entry was forcible or unlawful. These statutes are highly penal; and the Court will not, therefore, supply by intendment the want of an averment of force or of unlawfulness.

DENMAN, C. J.—This conviction cannot be sustained. The magistrates have a power of punishing a forcible detainer of lands which have been peaceably entered upon; but the detainer must be shewn to be unlawful. There is no averment in this conviction that the entry was unlawful; nor is there anything appearing upon the face of it which shews that the entry was not both peaceable and lawful. The question then is, whether a person who forcibly maintains his own possession is guilty of such an act as to entitle the justices to impose a fine. This conviction should have contained an averment of such facts as would have made the detainer appear unlawful. It is not sufficient to assert that the detainer was unlawful. The Court ought to see, from the facts averred in the conviction, that the detainer was unlawful. The party could not have taken a proper traverse upon the information stated in the conviction; he could only have traversed the word “unlawfully.”

PARKE, J.—The question has been reduced to two points; whether a party can be fined for a forcible de-

tainer, upon the view of the justices; and whether there should have been an allegation that the entry by the defendant was unlawful. This question arises on 8 *Hen. 6*, c. 9. I think it is clear that the justices may act summarily under that statute. Where a complaint is made to the justice, the party charged has an opportunity of traversing it: *Regina v. Leighton (a)*. If the party do not traverse the complaint, the justices may either proceed upon their own view, or, instead of deciding the question, receive the complaint as an indictment. The mode of procedure pointed out by the statute may be inconvenient, but it imposes no hardship on the defendant. If he do not chuse to traverse the information, it must be taken as admitted. I think that the objection as to the allegation of the possession of the premises by the prosecutor has been answered, and that there is a sufficient statement of possession in this case. As to the averment with respect to the entry by the defendant, I am inclined to think that the stat. of 8 *Hen. 6* does not apply to cases where the entry is lawful, and that there should have been an averment in the conviction that the entry was unlawful. I should have wished to take time to consider this point had not the rest of the Court entertained so decided an opinion upon it. I would add, however, that it by no means follows that the stat. *Hen. 6* does not apply to the case of a tenant from year to year holding over after the expiration of his tenancy. The holding over might be considered as constructively an unlawful entry,

1892.
The KING
v.
OAKLEY.

Constructive
entry by hold-
ing over.

TAUNTON, J.—I am of opinion that this record is not sufficient. The stat. of *Hen. 6* is highly penal, and is not to be extended by a loose construction;—least of all in these times, when the mischief intended to be remedied by that statute is not so alarming as when the statute was

(a) 1 Salk. 353.

(b) Where tenant for years surrenders and still continues possession, it is a *disseisin*, at election. *Pennington v. Morse*, Dyer, 62.

And see Hawk. P. C. book i, c. 1, s. 37; *ibid.* c. 28, s. 53; 1 Russell Crimes & Misd. 289; *Baron Snigg v. Shirton*, in the Star Chamber, Cro. Jac. 199.

1832.


 The KING
 v.

OAKLEY.

passed. To bring a case within the summary jurisdiction of the magistrates, every necessary circumstance must be stated clearly and explicitly. The preamble of the statute recites that the statute of 15 *Rich. 2* did not extend to cases where the entry was peaceable, but the subsequent holding forcible. The statute then enacts, that if any do hold lands or tenements forcibly, the justices shall cause the statutes previously passed to be enforced. It has been argued that any holding forcibly is within the statute of *Hen. 6*. I think that a forcible detainer after a *peaceable* entry is an offence within the meaning of the statute, but that no forcible detainer is within the intent of the statute unless there have been an *unlawful* entry. A party may enter peaceably, but at the same time unlawfully. It should have appeared on the face of this record that the entry was unlawful; and we cannot infer, by intendment, that the entry was unlawful. On the contrary, we are bound to presume that the entry was lawful. As to the case of *The Queen v. Leighton*, there was no decision of the Court upon the point.

PATTESON, J.—This question depends on the construction of 8 *Hen. 6*, c. 9. The statute of 15 *Rich. 2*, c. 2, only applied to forcible entries. Under that statute it was immaterial whether the entry was rightful or wrongful; but the case is very different where the party is merely detaining the possession. The mischief intended to be remedied by the statute of 8 *Hen. 6*, was where a party had acquired the possession peaceably, but unlawfully, and held that possession forcibly. There is no statement in this conviction that the entry was unlawful. The precedent in Lord Raymond is followed closely and exactly, except that the words "unlawfully expelled" are omitted. This omission raises a presumption in my mind that the entry was not unlawful. The question then is, whether a case is within the purview of 8 *Hen. 6*, where the entry was lawful and the detention forcible. I cannot bring my mind to entertain any

doubt upon the subject. I think it quite clear that in order to give the magistrates summary jurisdiction in case of a forcible detainer of land, the entry must have been unlawful. Were it held otherwise, mischievous consequences would ensue. A party who had been in possession of land for two years upon a lawful entry, and who forcibly maintained his own possession against another who endeavoured to dispossess him, might be summarily convicted of a forcible detainer, fined, and committed to prison.

1832.
The King
v.
Oakley.

Conviction quashed (a).

(a) And see *Res v. W. Williams*, 4 M. & R. 471; *Res v. Hale*, ib. 483.

The KING v. The Justices of NORFOLK.

PALMER had obtained a rule calling upon the magistrates to shew cause why a mandamus should not issue, requiring them to issue their warrant to commit to gaol an overseer of the name of *Serris*, for refusing to render an account of his receipts and payments.

Under 17 G. 2, c. 38, magistrates have a discretionary power whether or not they will commit an overseer for not accounting.

F. Pollock and *F. Kelly* now shewed cause. *Serris* had been appointed a churchwarden, but had not been sworn into his office. The only duty which he performed during the whole year was to sign two poor-rates. He had kept no accounts, having neither received nor disbursed any money on account of the parish. The magistrates have a discretionary power to commit; and *Serris*, by attorney, had appeared before them, and convinced them that he had no accounts to render.

An overseer, who has not acted except by signing the rates, is bound to deliver in an account of the sums due from the rate-payers.

Palmer, contra. The statute of 17 Geo. 2, c. 38, s. 1, directs that churchwardens and overseers shall keep an

1832.
 The KING
 v.
 NORFOLK.

account not only of the moneys received by them, but also of moneys rated and assessed and not received. *Serris* had acted as an overseer in signing two rates: *The King v. Justices of Gloucester* (a) and *The King v. Justices of Norfolk* (b). All that is required is, that, as he signed the rate, he should state what sums are due from the rate-payers. *Serris* attended by attorney (c); whereas he ought to have attended in person, as the account is, according to the 1st section of the act, to be verified upon oath before the justices.

DENMAN, C. J.—By the act of 17 *Geo. 2*, the magistrates have a discretionary power. We cannot therefore direct a mandamus to issue for the purpose of compelling the justices to commit *Serris*, who has satisfied *them* that he ought not to account.

PARKE, J.—*Serris* should have sent an account of all the moneys rated but not received. He ought, I think, also to have attended in person before the magistrates, to verify that account on oath. But the magistrates have a discretionary power, which they have exercised in the present case.

TAUNTON, J. and PATTESON, J. concurred.

Rule discharged, with costs as to the magistrates, but without costs as to *Serris*.

(a) 5 T. R. 346; 1 Nol. P. L. 249.

(b) 1 D. & R. 69; 5 B. & A. 484; 1 Nol. P. L. 141.

(c) As to attending with an attorney, see 4 Mann. & Ryl. 437 (b).

And see F. N. B. 25; Pleading in Walsingham's case, Plowd. 547; 4 Inst. 110, marg.; *Cor v. Coleridge*, 1 Barn. & Cres. 37, 2 D. & R. 86; *In re Jones*, Esq. Marshal of the King's Bench Prison, *post*, 128.

HOWARD v. BARTOLOZZI.

1832.

THIS was an action for money lent by plaintiff to defendant. The defendant pleaded the general issue, and a discharge under the insolvent debtors' act. At the trial before *Littledale, J.* at the sittings in this term for the county of Middlesex, it appeared that in the year 1829 plaintiff had lent a sum of money to the defendant, who, in April, 1830, was arrested and thrown into the King's Bench prison, and subsequently took the benefit of the insolvent debtors' act, but that plaintiff's debt was not inserted in the schedule of debts from which she then obtained her discharge. It appeared however that plaintiff had, up to the period of defendant's arrest, acted as her attorney, and that upon her taking the benefit of the insolvent act, the above-mentioned schedule was prepared in his office; that plaintiff not having been admitted to practise in the Insolvent Debtors' Court, another attorney (with whom plaintiff advised) acted for defendant in obtaining her discharge. Subsequently to such discharge, the defendant wrote three letters to the plaintiff, in which she recognized the debt and promised payment. The jury at first found a verdict for the defendant, and upon being asked what were their grounds for so doing, stated that they considered that the plaintiff had fraudulently omitted to put his debt on the schedule, with the intention afterwards to bring an action against her for it. Whereupon the learned judge directed that a verdict should be found for the plaintiff, and gave liberty to the defendant to move to enter a verdict for the defendant, or a nonsuit, as the Court should think fit. A rule nisi, for a new trial or to enter a verdict for the defendant, having been obtained by *F. Kelly* in Easter term last,

A., an attorney, employed by *B.*, an insolvent, to prepare her schedule, omits, with her privy, to insert his own debt:—*Seemle*, that this is not such a fraud as will destroy *A.*'s right of action against *B.* for the nonpayment of such debt.

Campbell and *Follett* now shewed cause. The defence to this action is, that the defendant was discharged by the

1832.

HOWARD

v.

BARTOLOZZI.

adjudication of the Insolvent Debtors' Court. The insolvent act discharges only such debts as are comprized in the schedule. But it is said that the defendant was guilty of a breach of duty in omitting to insert his debt in the schedule. A breach of duty would have been the subject of a cross action; but it could not destroy an existing debt. Supposing that *Howard* was the attorney of the plaintiff, it might have been a question whether his fraud or negligence was a defence to the action, if the point had been properly brought before the Court. The two letters are conclusive evidence that the defendant did not suppose that she was discharged from the plaintiff's debt, as they are written subsequently to her leaving prison.

F. Kelly, contra. If the plaintiff had done his duty, the defendant would have been discharged from this debt; and he cannot take advantage of his breach of duty. It was urged at the trial that the plaintiff was not the defendant's attorney. He acted however as such up to the period of her obtaining her discharge; and the reason assigned for his not directly acting for her on that occasion is, that he was not qualified to practise in the Insolvent Debtors' Court. Even then the schedule was prepared in his office by himself or his clerk; and he might, and probably would, have made a charge to her for so doing. If the omission to place the plaintiff's debt in the schedule had been by the fraudulent agreement of both parties, it would have operated as a bar to an action subsequently brought for such debt, as being contrary to the policy of the law and a fraud upon the other creditors. When an individual takes the benefit of the insolvent act, a judgment is by his consent entered up, in order that the creditors may the more readily obtain possession of the effects. In *Jackson v. Davison* (a) a warrant of attorney, which an insolvent had given to a creditor to induce him to withdraw his opposition, was set aside, on the ground that the agree-

(a) 4 B. & Ald. 691.

1882.

 HOWARD
 v.
 BARTOLOZZI.

ment, in pursuance of which the warrant of attorney was given, was contrary to the policy of the insolvent act, inasmuch as it enabled the creditor to take to himself a large portion of the future effects, which it was the intention of the legislature should be distributed amongst all the creditors. The breach of duty cannot be considered as merely ground for a cross action, but is a good defence to the present action. If *A.* owe *B.* a sum of money, and gives him a cheque for the amount on *A.*'s bankers, which cheque *B.* neglects to present in due time, and the bankers fail, the cheque, though never used, shall operate as a discharge of the debt by reason of the holder's laches. So here, the laches of the plaintiff in not putting his debt on the schedule discharges that debt, and consequently is a good defence to this action. But the case is here indeed stronger; for the plaintiff not only neglected to put his debt upon the schedule, but committed an actual fraud, having, as was found by the jury, wilfully concealed his own debt, in order that it might not be placed in the schedule, and the defendant be thus discharged. If a cross action were brought, the damages to be recovered in that cross action would be the precise sum recovered in this. Therefore, in order to avoid circuity of action, the laches and fraud must be admitted as a defence to the present action: *Alderson v. Langdale* (a), decided in the K. B. before Lord Tenterden, C. J.

Campbell, in reply, cited *Taylor v. Buchanan* (b).

DENMAN, C. J.—This is a motion for a new trial or to enter a verdict for the defendant, on the ground of fraud. I am of opinion that there is no ground which will warrant us in directing a verdict to be entered for the defendant. This case may be distinguished from the cases which have been hitherto decided, as here the debt never appeared in

(a) Not reported.

(b) 4 B. & C. 419; 6 D. & R. 491.

1832.

 HOWARD
 v.
 BARTOLOZZI.

the schedule. A creditor is not bound to come in; and if he do not come in, it is no fraud on his part to endeavour to obtain payment or security for his debt. It is otherwise where a party apparently comes in with the rest of the creditors, and afterwards takes a new security. This case is different from *Jackson v. Davison* (a) and *Carpenter v. White*. (b) In the latter case there was an express promise by the debtor. As to the fraud, if the fraud were distinctly made out, the verdict ought to be set aside. From the finding, it appears that there was fraud; that the plaintiff wilfully concealed his debt that it might not be put into the schedule, but we do not think the finding is warranted by the facts proved; for there is evidence to shew that the defendant did not expect that she was released from the debt to the plaintiff. There is proof, on the other hand, that there was a wilful concealment by both parties; but as the jury have found a special verdict, and as we think that the facts are not properly ascertained, a new trial must be had. Probably the question will then arise whether this is a defence under the general issue. At present we think that the jury have come to a conclusion not warranted by the evidence.

PARKE, J.—I am also of opinion that a new trial ought to be had. The jury have found fraud on the part of the plaintiff, and we are not at liberty to disregard their finding. But it appears to us that there are no premises which warrant the conclusion. If this debt was omitted to be put in the schedule with the consent of the defendant, it is contended, from the authority of *Jackson v. Davison*, that it was a fraud on the insolvent's creditors. I think this case is distinguishable from *Jackson v. Davison*, as there the name of the plaintiff was included in the schedule. There is no fraud in a creditor having his name omitted in the schedule. If he execute a composition deed, and thereby hold out to the rest of the creditors that

(a) 4 B. & Ald. 691.

(b) 3 B. Moore, 231.


he has come in with them, it is a fraud on his part; but if he do not hold himself out as having received a composition for his debt, there is no fraud. If the jury shall be of opinion that a debt was fraudulently omitted by the plaintiff in breach of his duty, without the consent of the defendant, it will then be for the Court to consider whether that is a good defence under the general issue. The argument that this ought to be a defence, in order to avoid circuity of action, has great weight with me. The cases on this subject are collected in a note to 2 *Wms. Saund.* 150. I give, however, no final or decisive opinion on this point. I should observe that there is no finding by the jury that the debt was omitted from the schedule by mutual agreement of the parties.

1832.
HOWARD
v.
BARTOLOZZI.

TAUNTON, J.—I also am of opinion that a new trial must be had in this case. My reason for thinking so is, that the jury have found fraudulent conduct on the part of the plaintiff; though, upon looking at the evidence, I have great doubt whether the jury were warranted in finding such fraud.

PATTESON, J.—I also think that there must be a new trial in this case. The Court is much hampered by the way in which the jury have given their verdict. They first gave a verdict for the defendant, and then for the plaintiff. I do not think that they were warranted in finding for the defendant.

Rule absolute for a new trial on condition of
admitting the debt.



1832.

The KING v. The Inhabitants of PENRYN.

From 1815 to 1830, *A.* occupied, at the rent of 6*l.*, three rooms, part of a dwelling-house in the parish of *B.*, of the value of 16*l.* per annum, divided into five sets of apartments with separate entrances, under an agreement by which *A.* was to pay and paid the taxes, &c., for the whole dwelling-house, the amount to be deducted from his rent:—
Held, that *A.* gained a settlement in *B.*

BY an order of two justices of the peace for the county of Cornwall, whereby *Honour Gill*, widow, and her three children, were removed from the parish of Budock to the borough of Penryn, both in Cornwall. The Court of Quarter Sessions confirmed the order, subject to the opinion of this Court upon the following case.

In 1815, *Henry Gill*, the deceased husband of the pauper, took of Mr. *Edgcome* a tenement, consisting of three rooms, in the borough of Penryn, at the rent of 6*l.* per year. These rooms originally formed part of a dwelling-house, which, prior to 1815, had been divided into five distinct dwelling-houses, of which the three rooms occupied by *Gill* formed one, each having a separate front door. The tenement rented by *Gill* consisted of two rooms on the ground floor, over which were three chambers, one occupied by *Gill*, the access to which was by stairs in the corner of one of the rooms on the ground floor. The other two chambers, forming part of another tenement, were separately occupied by two other persons, and were entered from a staircase leading from an open or common passage, as it originally stood before the house was divided; and in the chamber occupied by *Gill* was a door leading to the original staircase, but which was, upon the division of the house, nailed up, and so remained. The other tenements were occupied by other tenants. It was agreed between *Gill* and the landlord that *Gill* should pay all the rates upon the whole property, the amount to be deducted from his rent. *Gill* was accordingly rated to, charged with, and paid the church, poor, and highway rates for the borough of Penryn, between 1815 and 1830, for the whole premises, in one entire sum or charge. The aggregate annual value of these premises amounted to 16*l.* being the rent which the landlord received for the same, but the value

of the tenement occupied by *Gill* was under 10*l.* a year. In pursuance of the agreement with his landlord, *Gill*, when he settled his rent, was allowed the amount of the rates which he had from time to time paid. *Gill* was not answerable for the rent of any of the other tenants, nor had he any connection with or control over them.

1832.
The King
v.
Penny.

Follett, in support of the order of sessions. The question for the decision of the Court is, whether *Gill* gained a settlement in Penryn by being rated and paying rates for a tenement of above the value of 10*l.* a year, he having occupied only a tenement under that value. This question has been decided by the Court in two recent cases. The case of *The King v. St. Pancras* (a) determined that a settlement can be gained by the payment of rates, if the tenement be of the value of 10*l.* in respect of which the rate is imposed. It makes no difference that the party paying the rate is afterwards reimbursed the sum paid by him. *The King v. Lower Heyford* (b), *The King v. The Inhabitants of Armouth* (c), *The King v. Stapleton* (d).

F. Kelly, contrd. The cases of *The King v. St. Pancras*, and *The King v. Lower Heyford*, are opposed to the cases of *The King v. Islington* (e), and *The King v. Penryn* (f), and the Court have to determine which of these conflicting decisions are to be adhered to. By the 13 and 14 Car. 2, c. 12, s. 1, two justices may remove any person likely to become chargeable and coming to settle in any tenement under the yearly value of 10*l.* to the place where he was legally settled, for the space of 40 days. After the passing of this statute, if a party had resided 40 days in a tenement under the yearly value of 10*l.* he was irremovable, and consequently gained a settlement in the parish where

(a) 2 B. & C. 122.

(b) 1 B. & Adol. 75.

(c) 3 East, 362.

(d) Burr. Settlement Cases, 649.

(e) 1 East, 283.

(f) 5 M. & S. 443.

1832.

 The KING
 v.
 PENNYN.

the tenement was situate. If any one occupied a tenement of greater annual value than 10*l.*, he could not be removed at any time, and if he therefore chose to reside in the parish for 40 days he acquired a settlement there. By 1 *James 2*, c. 17, it was declared that the 40 days continuance of a person in a parish for the purpose of gaining a settlement should commence after delivery of notice to the overseers of the parish. This statute did not apply to any person who rented a tenement of the value of 10*l.*, such a person acquired a settlement without notice; it was therefore only necessary for those who occupied tenements under 10*l.* to give notice to the overseers. The act of 3 *W & Mary*, c. 11, is the next in order: the 6th section of that statute enacted, that if any person who should come to inhabit any parish should be charged and pay his share towards public taxes or levies of the said parish, then he should be deemed to have a legal settlement in the same, though no notice in writing were delivered. This statute made the payment of rates equivalent to notice to the overseers. The only persons on whom it was incumbent to give notice were persons who occupied tenements under the annual value of 10*l.*; this statute therefore only applied to occupiers of tenements under the value of 10*l.* This would therefore be the state of the law at this period of time, as to the acquisition of a settlement by rating a person who was charged and paid the taxes and rates for a tenement under the annual value of 10*l.* and gained a settlement by such payment. A person who was charged and paid the taxes and rates for a tenement above the annual value of 10*l.* did not gain a settlement by such payment of the rates and taxes. After this singular state of the law, the legislature passed the act of 35 *Geo. 3*, c. 101. The third section of that statute enacted that no person coming into any parish should gain any settlement by delivery of any notice in writing; and the fourth section of the same statute declares, that no person who shall come into any parish shall gain a settlement in such parish by paying his

taxes, &c., in respect of any tenement or tenements, not being of the value of 10*l*. The legislature evidently intended that this statute should be applicable only to those persons who might formerly acquire a settlement after notice given to the overseers; or, in other words, to the occupiers of tenements under the annual value of 10*l*. It was not the intention of the framers of the act that a mere rating of a tenement above the value of 10*l*. should confer a settlement. The 3d and 4th sections of the act must be construed together; and if the two sections be taken together it will be seen that they apply to cases where notice was formerly necessary. The facts of this case are precisely the same as in *The King v. Penryn*; the dwelling-house may have been the same in both cases. The law is since altered by 6 *Geo.* 4, c. 57; and a settlement by rating cannot now be acquired. The case merely states that *Gill* paid the rates between 1815 and 1830. It does not appear that the rating took place previously to the passing of 6 *Geo.* 4, c. 57. The rating may have been in 1829.

1832.

 The KING
 v.
 PENRYN.

DENMAN, C. J.—Upon reading this case we cannot doubt that the Court of Quarter Sessions meant that *Gill* was rated to, and charged with, and that he paid, the church, poor, and highway rates during all the period of time between the years 1815 and 1830. There was therefore a rating previously to the passing of 6 *Geo.* 4, c. 57. The act of 35 *Geo.* 3, c. 101, declares that no person shall gain a settlement by being charged with, and paying his share towards, the public taxes or levies of the parish, in respect of any tenement not being of the yearly value of 10*l*. It would be too much to infer, according to the ingenious argument of Mr. *Kelly*, that this act applies only to cases where notice to the overseers of the parish of a coming to inhabit was formerly necessary. The cases of *Rex v. Islington*, and *Rex v. Penryn*, were referred to and much considered in *Rex v. St. Pancras*, and were deliberately overruled.

1830.

 The King
 v.
 PARRYN.

PARRER, J.—There is a period of time when a point of sessions law must be considered as settled. This question has been twice considered; namely, in *Rex v. St. Pancras*, and in *Rex v. Lower Heyford*, we cannot now decide contrary to those two cases.

TAUNTON, J. concurred.

Order of Sessions confirmed.

—◆—

The KING v. EVAN OWEN JONES, THOMAS TRUBY,
 ELIZABETH TRUBY, and ELIZABETH TRUBY the
 Younger.

An indictment for a conspiracy to embezzle the goods of a bankrupt, must state the trading, petitioning creditor's debt, and the becoming bankrupt.

It is not sufficient to state that a commission issued under which the party was duly found and declared to be a bankrupt.

First count.

AT the General Quarter Sessions held for the city of Bristol in October, 1830, the defendants were found guilty upon an indictment for fraudulently concealing the goods of *Jones*, who had been declared a bankrupt.

The first count of the indictment stated, that on the 2d day of December, 9 Geo. 4, a commission of bankruptcy issued against *Jones*, directed &c.; By virtue of which commission the commissioners found that *Jones* had become a bankrupt within the meaning of the statute then in force, and adjudged him a bankrupt accordingly; And that all the defendants, contriving to cheat the creditors of *Jones*, on the 10th day of December, in the year aforesaid, did conspire unlawfully, fraudulently, and against the form of the statute in such case &c. to remove, conceal, and embezzle a great part of the personal estate of *Jones*, that is to say, twenty-two Bank of England notes of the value of 100*l.* each; and that, in pursuance of such conspiracy, *Jones* did, on the said 10th day of December, unlawfully deliver and cause to be delivered to *Elizabeth Truby*, and *Elizabeth Truby* did receive and have of and from the said

taxes, &c., in respect of any tenement or tenements, not being of the value of 10*l*. The legislature evidently intended that this statute should be applicable only to those persons who might formerly acquire a settlement after notice given to the overseers; or, in other words, to the occupiers of tenements under the annual value of 10*l*. It was not the intention of the framers of the act that a mere rating of a tenement above the value of 10*l*. should confer a settlement. The 3d and 4th sections of the act must be construed together; and if the two sections be taken together it will be seen that they apply to cases where notice was formerly necessary. The facts of this case are precisely the same as in *The King v. Penryn*; the dwelling-house may have been the same in both cases. The law is since altered by 6 *Geo.* 4, c. 57; and a settlement by rating cannot now be acquired. The case merely states that *Gill* paid the rates between 1815 and 1830. It does not appear that the rating took place previously to the passing of 6 *Geo.* 4, c. 57. The rating may have been in 1829.

1832.

The KING
v.
PENRYN.

DENMAN, C. J.—Upon reading this case we cannot doubt that the Court of Quarter Sessions meant that *Gill* was rated to, and charged with, and that he paid, the church, poor, and highway rates during all the period of time between the years 1815 and 1830. There was therefore a rating previously to the passing of 6 *Geo.* 4, c. 57. The act of 35 *Geo.* 3, c. 101, declares that no person shall gain a settlement by being charged with, and paying his share towards, the public taxes or levies of the parish, in respect of any tenement not being of the yearly value of 10*l*. It would be too much to infer, according to the ingenious argument of Mr. *Kelly*, that this act applies only to cases where notice to the overseers of the parish of a coming to inhabit was formerly necessary. The cases of *Rex v. Islington*, and *Rex v. Penryn*, were referred to and much considered in *Rex v. St. Pancras*, and were deliberately overruled.

1832.

The KING
v.

JONES.

Seventh count.

fully and fraudulently concealing a great part of the personal estate of *Jones*, then and there of great value &c. to the great damage &c. *Seventh count*, that *Jones* having been adjudged and declared a bankrupt as aforesaid, and the commission being in force, the four defendants, on &c. did conspire unlawfully to conceal a great part of the personal estate of the said *Jones*, then and there of great value &c., to the great damage, &c.

Certiorari.

This indictment was removed by *certiorari* into the Court of King's Bench, and in Trinity term last, *Bompas*, Serjt., obtained a rule *nisi* to arrest the judgment, against which,

Merewether, Serjt., now shewed cause. The objection to this indictment is, that it omits to state the petitioning creditor's debt, the trading, and the act of bankruptcy. These averments were necessary under the 5 *Geo. 2*, c. 30; but they are not required by 6 *Geo. 4*, c. 16, the act now in force. The language of the latter statute differs materially from that of the former. The 5 *Geo. 2*, c. 30, enacts by the 1st section, that if any person *who hath become a bankrupt* within the meaning of the statute then in force concerning bankrupts, and against whom a commission shall have been awarded, and who shall have been declared a bankrupt, shall conceal any part of his personal estate, to the value of 20*l.*, with intent to defraud his creditors, he shall be deemed guilty of felony. The 6 *Geo. 4*, c. 16, s. 112, enacts, that if *any person against whom any commission shall be issued, whereupon such person shall have been declared bankrupt*, shall conceal any part of his estate, with intent to defraud his creditors, every such bankrupt shall be guilty of felony, and shall be liable to be transported for life, or for such term, not less than seven years, as the Court before which he shall be convicted shall adjudge. There is this difference between the language of the two statutes:—the former statute says, that if any person *who shall be a bankrupt*; the latter statute says, if any

Felony, under
5 *Geo. 2*, c. 30,
s. 1.

Felony, under
6 *Geo. 4*, c. 16,
s. 112.

Distinction
between these
enactments.

person *against whom a commission has issued*, shall conceal his property, he shall be guilty of felony. Under the statute of 5 Geo. 2, it was a condition precedent to a conviction, that the party should be a bankrupt, and that a commission should have issued against him, and that he should under that commission have been declared a bankrupt. Under the statute of 6 Geo. 4, the only condition is, that a commission shall have issued, and that the party shall under it have been adjudged a bankrupt. The present indictment, though it must be admitted not to be so framed as to be good under the old statute, is yet sufficient under the new.

There is another ground upon which this indictment may be supported,—that it is an indictment for a conspiracy to do an unlawful act. It appears from the case of *The King v. Turner (a)*, which was cited when the rule nisi was obtained, that the combining to do an unlawful act is a conspiracy. The concealment of the goods was unlawful; for a commission having issued under the great seal, and the party having been declared a bankrupt, it was his duty to put his goods under the custody of the law. [Parke, J. Then if a commission illegally issue against a man, he is liable to be transported for seven years if he do not surrender under the commission.] The adjudication by the commissioners forms a *prima facie* case of the party's being a bankrupt; and as the primary object of the Bankrupt Act is to secure an equal division of the property amongst the creditors, it may have been considered by the legislature that such object would be best effectuated by declaring, that in all cases where a commission of bankrupt has issued, although it may be supersedable, the party shall give up his property to the commissioners appointed by that commission, and shall not attempt any concealment. The cases of *King v. Punshon (b)*, *Guinness v. Carroll (c)*, and

1839.
The KING
v.
JONES.

Second ground
—Conspiracy
to do unlawful
act.

(a) 13 East, 228.

(c) 2 Mann. & Ryl. 139.

(b) 3 Campb. 96.

1832.

 The King
 v.
 Jones.

Rex v. Frith (a), which may be relied upon on the other side, are all cases under the statute of *Geo. 2*,

Bompas, Serjt. in support of the motion. The Court, in construing a statute, will not infer that the words constitute a crime if they will bear another construction. The statute of *Geo. 4* does not contain the same words, but it contains the same provisions as the act of *Geo. 2*. The 112th section refers to the 18th section, and that section declares who shall be bankrupts. A commission cannot lawfully issue against a party, unless he is a trader, owes a debt of a certain amount, and has committed an act of bankruptcy. Here, the indictment having omitted to state these circumstances, it is to be assumed that they did not exist; consequently the commissioners had no authority, and the party might have brought an action against the messenger of the commission for these very goods. A party cannot be indicted for stealing his own goods (*b*). The defendant might have maintained an action for these very goods, and yet he is to be found guilty of and punished for conspiring to remove them. [*Taunton*, J. The gist of the indictment is the conspiracy.] There are not sufficient averments to make the crime charged a conspiracy. It does not appear that the act done was unlawful. A conspiracy is the combining to do an unlawful act, or to do a lawful act by unlawful means. (Here he was stopped by the Court.)

DENMAN, C. J.—It is quite clear that if the indictment had been for felony, it would have been informal in its present shape. There must have been averments that the defendant had traded and become a bankrupt. The question then arises whether the indictment can be supported as charging a conspiracy to defraud the creditors of a bankrupt *de facto*, a commission, *primâ facie* good,

(a) 1 Leach's C. C. 12.

(b) Except where the larceny is committed by the owner for the

purpose of charging a bailee or the hundred. H. P. C. 67.

having issued against him. The same answer applies to both; if it was necessary to state the trading, act of bankruptcy, and petitioning creditor's debt in the one case, it is so in the other. If the party was not a trader, the commission was illegal. The indictment should have charged an unlawful act; but the only act stated is the removal and concealment of the goods; whereas, if the commission is bad, the party had a right to remove them. Were we to hold the indictment good, this absurdity would follow, that a person might recover goods by action, and yet be declared a felon for removing those identical goods. No unlawful act, therefore, is stated. A conspiracy is the combining either to do an unlawful act, or to do a lawful act by unlawful means. I am of opinion, therefore, that this indictment for conspiracy cannot be supported, and that judgment must be arrested.

1832.

 The King
 v.
 Jones.

PARKE, J.—I am also of opinion that the rule to arrest the judgment in this case must be made absolute. In an indictment it should be stated either that an unlawful act was done, or that a lawful act was done in an unlawful manner. It is said that the act charged is unlawful; but I do not think that sufficient is stated in the indictment to make it appear that the act is unlawful. This indictment would not have been sufficient under the stat. of 5 Geo. 2. The only question is upon the 112th section of 6 Geo. 4. I am of opinion that the 112th section refers to the 18th section of the same act, and that it is not such an offence as the statute was intended to provide for, to remove goods, or conceal goods from the commissioners, unless the commission be valid. The word "commission" made use of in the 112th section, must mean "such commission as is before mentioned." Other parts of the same act require, that before a commission shall be issued, an act of bankruptcy shall have been committed, and that the party shall owe a debt to a certain amount.

1839.
 The KING
 v.
 JONES.

TAUNTON, J.—I am of the same opinion. The rule as to indictments I apprehend to be this: that all those circumstances must be stated which shew that some offence must necessarily have been committed, and not merely so much matter as will induce a probability of such offence having been so committed. It is not sufficient that the commission issued, or that the commissioners adjudged him a bankrupt; he must actually have become a bankrupt. Now this indictment states nothing of the sort. In every commission there is a recital of the trading, petitioning creditor's debt, and act of bankruptcy. Here, after stating that the commission had issued, they should have proceeded as in the commission itself, to state that he had traded and become a bankrupt, as well as that he was so found by the commissioners. The commissioners may have done all that they have done, without *Jones* having ever legally subjected himself to their authority by the commission of an act of bankruptcy; and if this were so, it was not an unlawful act in him to remove the goods and conceal them from these unauthorized commissioners. If the goods had been in the possession of the commissioners he might have re-taken them, and in so doing have at most committed a trespass; and the case of *The King v. Turner* shews that a combining to commit a trespass does not amount to a conspiracy.

PATTESON, J.—I am of the same opinion. It was conceded on the part of the prosecutor of this indictment, and several cases shewed, that under the old act there used always to be inserted in the indictments allegations of a trading and committing of an act of bankruptcy. It was then endeavoured by him to be shewn that the 6 *Geo. 4*, c. 16, made this unnecessary, and that any man *de facto* found to be a bankrupt, by conspiring to remove his goods, and to conceal them from the commissioners, is guilty of doing an unlawful act. It appears to me that this cannot

be. In the former part of the statute it is declared what person may be a bankrupt, and throughout the rest of the act it is said "such bankrupt." I am of opinion, therefore, that the allegations as to the bankruptcy are deficient, and that this indictment is bad.

1832.
The KING
v.
JONES.

Judgment arrested.

HULL DOCK COMPANY v. PRIESTLY.

DEBT for tonnage dues, payable in respect of ships and vessels of the defendant. Plea, nil debet.

At the trial before *Vaughan*, B., at the Yorkshire Summer Assizes, 1831, a verdict was found for the plaintiffs for 12*l.* debt and one shilling damages, subject to the opinion of the Court upon the following case :

The plaintiffs, who are incorporated by the name of "The Dock Company at Kingston-upon-Hull," are the owners of extensive docks, basins, quays, and wharfs at the town and port of Kingston-upon-Hull, constructed, improved, and maintained by them in pursuance of certain acts of parliament passed in the 14th, 42d, and 45th *Geo. 3.* The defendant is clerk to the Aire and Calder Navigation Company, who are the real defendants ; and it is admitted that, for the purpose of trying this question, he is properly sued.

This action is founded upon the 42d section of 14 *Geo. 3.*, c. 56, (extended as hereinafter mentioned,) which imposes certain tonnage duties upon all vessels coming into or going out of the harbour, basins, or docks, or loading or unloading within the said port ; and the plaintiffs seek to recover the duty per ton payable upon the vessels hereinafter named. Goole is situate on the river Ouse, inland 25 miles west of Kingston-upon-Hull ; and the Aire and Calder Navigation Company have there recently made docks, and built quays, warehouses, and other conveniences suitable

Vessels taking in the whole or part of their cargo in the port of Goole, and proceeding therewith to Hull, are liable to pay to the Hull Dock Company the tonnage duties of 2*d.* per ton, under 42 *G. 3.*, c. xci, s. 44.

Vessels proceeding to Hull from a place above Goole, (as Leeds,) and not touching at Goole, but merely passing the entrance into the port of Goole, are not liable to tonnage duty.

1834.

HULL DOCK
COMPANYv.
PRIESTLY.Commission to
set out limits
of port of
Goole.

Hull.

Grimsby.

14 G. 3, c. 56.

42 G. 3, c. xci.

45 G. 3, c. xlii.

for carrying on a foreign trade. On the 13th of December, 1827, a commission issued out of the Exchequer purporting to appoint Goole to be a port in the United Kingdom for the import and export of goods, and assigning commissioners for setting out the limits of the said port, and to appoint legal quays for the loading and unloading of goods, and for other purposes therein mentioned; the commissioners proceeded to assign and set out such limits and appoint such legal quays, and on the 19th of January, 1828, certified to the barons of the Exchequer that they had so done. The commission and certificate were afterwards inrolled in the Exchequer, and since that time there have been a custom-house, custom-house officers, and king's warehouses at Goole. Hull is situate upon the Humber, into which river, and considerably to the westward of the town, fall the two rivers Ouse and Trent, losing at their confluence their respective names in that of Humber. Grimsby is an ancient port on the Humber to the south-eastward of Hull, and about thirty years ago was constituted a port for foreign trade. By 14 *Geo. 3*, c. 56, s. 42, certain rates were directed to be paid by ships or vessels (with certain exceptions) coming into or going out of the said harbour, basin, or docks within the port of Hull, or unloading or putting on shore, or lading or taking on board any of their cargo, or any goods, wares, or merchandize within the said port. By the 44th section, certain exceptions are introduced in favour of coasting vessels. The 45th section imposes certain wharfage dues, and by the 49th section the customer is not to discharge any vessel until the rates and duties payable under that act were paid. In pursuance of such act a considerable part of the now existing basins, quays, and conveniencies were constructed, and large sums of money expended by the dock company thereon. By 42 *Geo. 3*, c. xci, the dock company were empowered to make an additional dock, which was subsequently made. By 45 *Geo. 3*, c. xlii, the rights and privileges which belong to the port of Hull were extended to the docks and basins respec-

tively, which, to all intent and purposes, were to be deemed and held to be part of the port of Hull.

At the Yorkshire Lent Assizes, 1829, an action was tried between the present plaintiffs and *William Browne*, but the real defendants were the Aire and Calder Navigation Company. It was an action of debt for tonnage dues payable in respect of ships and vessels of the defendants, having laden and taken on board and unladen and put on shore goods and merchandize within the limits of the port of Hull. A verdict was found for the plaintiffs, subject to the opinion of the Court of King's Bench on the case reserved. Upon the argument of the

1682.
HULL DOCK
COMPANY
v.
PRIESTLY.

Former trial
between plain-
tiffs and
Browne.

Special case. Decision, that Goole is not within the port of Hull. a contrary opinion, and judgment was accordingly pronounced in favour of the defendants. (a) Before that decision the Hull Dock Company had been in the habit of claiming the last mentioned duties from vessels trading between Goole and foreign ports, but they afterwards discontinued such claim, and then demanded the duties now in dispute; a demand with which the Aire and Calder Navigation Company refuse to comply.

In April, 1831, "The Eagle," a steam-vessel belonging to the Aire and Calder Navigation Company, took on board a cargo of goods at Goole, and proceeded therewith to the port of Hull, came into the basin of the Humber dock, within the port of Hull, and unloaded its cargo on the plaintiffs' quay or wharf. First class.

In the same month "The Stanhope," a sloop, also belonging to the Aire and Calder Navigation Company, took in a part of its cargo at Leeds, and proceeded therewith to Goole, where it took on board the remaining part of its cargo, and proceeded thence therewith to Hull, where it came into the Humber Dock, and there Second class.

(a) See this case, 2 Barn. & Adol. 43; 6 Mann. & Ry.

1832.
 HULL DOCK
 COMPANY
 v.
 PRIESTLY.

unloaded and delivered a part of the same into other vessels alongside. It afterwards proceeded through the docks into the harbour, and within the port landed the remainder of its cargo upon the quay belonging to *Tomlinson* and *Newbald*.

Third class.

In the same month "The *Blücher*," another sloop, also belonging to the said Navigation Company, took on board its cargo, consisting of goods, wares, and merchandize, at *Leeds*, and proceeded thence therewith to *Hull* and came into the harbour there, and within the said port unladed and delivered the same upon the said quay, having in the course of its voyage passed through the entrance basin of the docks at *Goole* without taking in any goods there.

Fourth class.

In the same month, "The *Fame*," another sloop also belonging to the said *Aire and Calder Navigation Company*, came into the said harbour, and within the said port, laded and took on board, from the quay, a cargo for *Leeds*, and went out of the harbour with its cargo on board, and proceeded on its voyage to *Leeds*, passing through the entrance basin of the docks at *Goole*.

Vessels not registered.

In each of the foregoing instances the plaintiffs demanded the tonnage dues of 2*d.* per ton from the persons in command of the respective vessels, but payment was refused. None of the said vessels were registered either at the port of *Goole* or elsewhere, but upon the paddle box of the steamer was painted "The *Eagle of Goole*." Previously to the decision in the action against *Browne* and others, vessels coming down or going up the *Ouse* and *Trent* to or from *Hull*, paid to the *Hull Dock Company* no dock dues or tonnage duties, although such were paid by vessels departing the *Ouse* and *Trent* on foreign voyages. Wharfage has regularly been paid to the *Hull Dock Company* on all vessels, whether foreign bound or otherwise, that have come into the basins or docks and there landed goods upon the quays. Such payment is charged upon the goods for the use of the quays, and is disbursed by the owner of the goods. Where no goods have been landed no such wharfage has

Wharfage.

been required, and the wharfage rates themselves are less than are usually charged in the port of London. Wharfage was paid to the company in respect of all the goods which were landed from the several vessels in question on the quays and wharfs of the Hull Dock Company on the several occasions in question.

1832.
HULL DOCK
COMPANY
v.
PRIESTLY.

Whenever foreign-bound vessels, or vessels passing between Grimsby and Hull, have entered the harbour, basins, or docks, they have paid to the Hull Dock Company tonnage dues in addition to such wharfage as by their use of the quays or wharfs they may have become liable to pay; the tonnage dues, in the case of Grimsby vessels, are *2d.* per ton. The dock dues are a charge upon the register tonnage of the vessel, and are payable by its owner. Vessels that only pass between Hull and Grimsby, or from Hull up the Trent and Ouse, or to Hull down those rivers, require no coasting, or other custom-house, papers, nor do they pay coasting duties. Before the abolition, in March, 1831, of the tax on sea-borne coals, that tax was levied by the custom-house officers at Hull, upon all coals brought coastwise into the port of Hull from Newcastle, although upon coals brought to Hull down the Ouse or Trent no such tax attached.

Upon this state of facts the plaintiffs contended at the trial, that the before-mentioned vessels were liable to the tonnage rates demanded. It is agreed that the before-mentioned acts of parliament, special case and judgment, and the map hereunto annexed, shall be considered as embodied in the case, that either party may refer to any public act of parliament, and that the case itself may be turned into a special verdict, if this Court shall think fit.

Alexander, for the plaintiffs.—The question depends upon 14 G. 3, c. 56 the 42d sec. of 14 Geo. 3, c. 56, which enacts, that “from and after the 30th Dec. 1774, there shall be paid and payable to the said company, or their collectors or deputies, for their use, for every ship or vessel, (the king’s ships of war and other ships and vessels employed in his Majesty’s service

1833:

MULI DOCK
COMPANY
v.
PRINCELY.

only excepted,) coming into or going out of the said harbour, basin, or docks, within the port of Kingston-upon-Hull, or unlading or putting on shore, or lading or taking on board any of their cargo, or any goods, wares, or merchandize within the said port, by the master or commander, owner or owners, of every such ship or vessel, the several rates or duties of tonnage (according to the full of the reach and burthen) hereafter particularly rated and described, that is to say (amongst others)—For every ship or vessel coming to or going between the port of Kingston-upon-Hull and any port to the northward of Yarmouth in Norfolk, or any port to the southward of the Holy Island, for every ton 2d. For every ship or vessel trading between the said port of Kingston-upon-Hull and any port or place in Great Britain, not before described, for every ton the sum of 6d.(a) Goole is a port to the northward of Yar-

(a) The 42d section then proceeds as follows:—"Which rates or duties shall be and are hereby vested in the said dock company as their own proper monies, and to and for their own proper use and behoof, for the purposes aforesaid; and shall be paid at the time of such ship's or vessel's entry inwards, or clearance or discharge outwards, or in case any ships or vessels shall not enter as aforesaid, then at any time before such ships or vessels shall proceed from the said port at the custom-house in the said port."

44th section—"This act shall not extend to charge any ship or vessel with the rates or duties aforesaid, or any part thereof, which shall come or go, coastwise, from or to any port or place in Great Britain, to or from any place up the rivers Trent or Ouse, within the limits of the port of Hull, as now used, or to or from any other

place up the said rivers Trent or Ouse, or any other river which falls into the said rivers, or either of them, or which shall trade between any such port or place in Great Britain and any such place as aforesaid, within or up the said rivers or either of them, unless such ship or vessel shall come into or go out of the basin or dock, or any part of the said harbour or haven, called 'Hull Haven,' or shall use the said basin, or dock, or quays, within the said harbour; or shall unlade or put on shore, or lade or take on board any goods, wares, or merchandize, or any part of the cargo of any such ship or vessel within any part of the river Humber; or to charge with the said rates or duties, or any part thereof, any such coasting ship or vessel which shall go into, or by the officers of the customs be called into, the said harbour or haven, for the sole purpose of being entered or

mouth and to the southward of Holy Island. Vessels therefore lading at the port of Hull and going to and from Goole are within the express words of the act, and become liable to the duty of 2*d.* per ton. It cannot be considered an answer to this that Goole did not exist as a port at the time of the passing of the dock act; *Downing College v. Purchas (a)*, *Harrison v. Bulcock (b)*. As well might it be said that steam vessels are not within the rating clause, because steam vessels have been introduced for the first time since the act was passed. Nor can it be an answer to shew that no papers are furnished by the custom-house to vessels passing from Hull to the interior, for there are many seaward bound vessels which are unfurnished with such papers; for example, vessels under 15 tons burthen, vessels in ballast or carrying passengers only. Yet these would indisputably be liable to pay dock dues in the event of their using the docks. So also the Grimsby vessels are found by the case to need no coasting papers, and yet they pay the tonnage duties. In fact, the 49th section is merely a mode of securing payment of the dues whenever it can be made

1892.

 HULL DOCK
 COMPANY
 v.
 PRIESTLY.

cleared at the custom-house there."

45th section—"That all goods, wares, and merchandize, which shall be landed or discharged upon any of the quays or wharfs which shall be erected by virtue of this act, shall be liable to pay and shall be charged and chargeable with the like rates of wharfage and payments as are usually taken or received for any goods, wares, or merchandize, loaded or discharged upon any quays or wharfs in the port of London, and shall be paid to the respective company and owners of the said quays or wharfs so to be erected as aforesaid, in like manner as the rates and duties

established by this act are hereby directed to be paid."

49th section—"That no customer, collector, &c., shall hereafter give or make out any cocket, or other discharge, or take any report outwards for any ship or vessel trading or coming to the said port, until the rates, duties, and payments hereby granted or payable by the master or other person taking charge of such ship or vessel, according to the tenor and true meaning of this act, shall be paid into the respective collectors or officers appointed to receive the same as aforesaid, &c."

(a) 3 B. & Ad. 162.

(b) 1 H. Bla. 68.

1832.

 HULL DOCK
 COMPANY
 v.
 PRIESTLY.

available, and is cumulative upon the power of distress given by s. 47, and the common law right of action. *Chapman v. Pickersgill* (a). The same argument would extinguish the Hull Dock Company's right to wharfage, which is equally controllable by the custom-house officers and, yet, recoverable by distress or action. But it is admitted that the vessels in question are liable to wharfage. It is no answer to the plaintiffs' claim to say, that wharfage is paid for these vessels, and therefore that tonnage ought not to be so. Wharfage is given by the 45th section. It is a charge upon the *goods*, payable to the respective *owners of the wharfs*, fluctuating in amount with the corresponding charge at the London Docks, and demandable only in case of goods being landed or discharged. *Hull Dock Company v. La Marche* (b). But the tonnage duties are a charge upon the *vessels*, payable to the *Hull Dock Company* alone, fixed in amount by the Dock Act, and demandable whether any goods be landed or not. They are, consequently, wholly different heads of charge. Besides, what compensation do the Dock Company derive from wharfage paid to individuals uninterested in the docks? Yet the tonnage duties are given as a compensation to the Company for the user of their docks. The argument derivable from the non-payment of a tax on coals brought riverwards, whilst seaborne coals were liable to pay it, only proves that the river navigation is not a navigation "coastwise" or "by sea," to which sort of navigation alone the 111th section of 6 Geo. 4, c. 107, attaches. But it is not contended, nor need it be, that the navigation between Hull and Goole is either "coastwise" or "by sea." The non-registry of the vessels in question is immaterial. The act nowhere points to the register as being a criterion of the tonnage or liability of the vessel; and sections 46 and 47 expressly prescribe a mode of measurement upon which, being completed, the rate per ton attaches. Be-

(a) 2 Wils. 145.

(b) 2 Mann. & Ryl. 107; 8 B. & C. 42.

sides, the Register Act is not applicable to vessels sailing exclusively upon rivers, nor to coasters under fifteen tons burthen; yet what reason can be assigned why such vessels should not pay for using the docks? It is true that the 42d section makes the duties payable "at the entry inwards or clearance or discharge outwards at the custom-house." But the former words must be understood either in the popular sense of "entering" or "quitting" the docks, or they must be considered as applicable to such vessels as come within the 49th section, and not as restrictive to them only; the latter words must be construed to designate the custom-house as a convenient place of *payment*, and not as the source of the *liability to pay*. The non-payment hitherto of the dues now demanded is immaterial. In the *Hull Dock Company v. Browne (a)*, a usage for fifty years was considered much too recent to afford any inference of liability. Yet here the non-payment can only have been since 1828, when Goole was erected into a port. The difference in the places from or to which the respective vessels were bound cannot affect the question of their liability. They all come ostensibly from the port of Goole, and the Dock Company afford the same accommodation, whatsoever place the cargo is obtained from or consigned to. But the object of the Hull Dock Act was to make the accommodation and the compensation reciprocal; and that object would be frustrated by allowing the suggested distinction.

If Goole should not be considered a *port* within the meaning of the Hull Dock Act, it is at least a "place," and so within the clause that imposes a tonnage duty of 6d. It is true, that to claim duty in an inverse ratio to the distance seems an absurdity. But, if it be so, it is one created by the defendants themselves in negating the application of the word "port" to Goole, and so excluding the operation of the twopenny clause. The defendant is, in point of fact, claiming an unlimited user of the Hull

1832.

 HULL DOCK
 COMPANY
 v.
 PRIESTLY.

(a) 2 Barn. & Adol. 43.

1882.

HULL DOCK
COMPANYv.
PRIMSTLY.

Docks, at any period and to any extent, without offering the slightest compensation.

Wightman, with whom was *Milner*, contra. There are three different classes of vessels, 1st, Those which load at Goole and discharge their cargoes at Hull. 2dly, Those vessels which load at Leeds, pass through the basin at Goole, and discharge their cargoes at Hull. And 3dly, Those which load at Hull and discharge (a) their cargoes at Leeds. The plain and obvious meaning of the 42d section is, that vessels which are chargeable with tonnage rates must proceed seaward and to the eastward of Hull. If the literal construction of the act contended for be adopted, a vessel coming from Liverpool would be liable to pay no more than 2d. per ton. The words in the act, that the rates shall be paid at the time of such vessel entering inwards or clearance or discharge outwards, evidently shew that such vessels only are contemplated, and are within the meaning of the act, as are cleared or discharged by the custom-house. The plaintiff cannot contend that the 44th section of the act extends the operation of the 42d section. The 44th is an exempting clause, and it would be singular if a clause of exemption were to extend the operation of the section imposing the rates. The 44th section applies only to vessels going coastwise, that is, by sea; such vessels were formerly regulated by 13 Car. 2, stat. 1, c. 14. This is an act imposing a tax upon the public, and there are no clear and unequivocal words charging vessels of these descriptions. According to the argument on the other side, the greater the distance a vessel came from, the less would be the rate of tonnage. A vessel passing through Goole would pay 6d. per ton, but a vessel from Scarborough only 2d. Then as to that class of vessels which come from Leeds, and pass through Goole, on their way to Hull. It is admitted that vessels passing down the Trent to Hull are not chargeable with tonnage rates. If vessels

(a) This embraces the fourth no distinction was attempted to case, between which and the third be drawn.

from Leeds are to be charged, there would then be this anomaly—a vessel from the Trent would be exempt—a vessel from the Aire would be liable.

1836.
HULL DOCK
COMPANY
PRINTED.

Alexander, in reply. Although the 44th section cannot extend the meaning of the 42d, it may explain it; per *Lord Tenterden*, in the case of *The Hull Dock Company v. Browne*. The 44th section points out the extent to which the exemption is to be carried, and that very exemption proves the legislature to have thought that the vessels mentioned in the 44th section would have been chargeable with tonnage duties unless so exempted. It also shews that they had under their notice the question of exemption; and the absence of any provision in favour of river vessels negatives their title to such a privilege. If the vessels in question are coasters, they are liable under the 44th section, because they have used the docks; if they be not, they are liable under the 42d section, because not exempted from its operation by the 44th. It is urged on behalf of the defendant, that the ports affected by the twopenny duty must be to the eastward of Hull. But the act prescribes no such limitation. It speaks of ports generally between Holy Island and Yarmouth, and must be understood as referring to ports on the east coast of England, which Goole undoubtedly is. No ambiguity has been shewn to exist in the 42d section; and the case, therefore, does not fall within the rule of strict construction, where a burthen is imposed on the public. If not ambiguous, the vessels in question were “ships or vessels” “coming to or going between” the “port of Kingston-upon-Hull,” and a “port to the northward of Yarmouth” and “the southward of Holy Island;” and as such, liable to the tonnage duty demanded.

DENMAN, C. J.—We think it perfectly clear that Goole is a port on the east coast to the south of Holy Island, and consequently that vessels which load at Goole, and after-

First class—
Liability of
vessels loading
at Goole and
going within
port of Hull.

1854.

HULL DOCK
COMPANY

v.

PRIESTLY.

Third class—
Non-liability
of vessels com-
ing from Leeds.Meaning of
word "Place."Subject, not
chargeable un-
less duty dis-
tinctly im-
posed.

wards go within the harbour of Hull, are liable to the tonnage rate of twopence per ton.

With respect to the vessels which come from Leeds, I am of opinion that there are no words in the act of parliament sufficiently clear to make them liable to any tonnage duty whatever. They clearly would not have been liable to tonnage duties before Goole became a port, and they cannot be said to proceed *from* Goole, as they merely pass through the basin there. These vessels are, therefore, not liable to the duty of twopence per ton. But it was contended that if they be not liable to the duty of twopence per ton, that as they come from another "place in Great Britain not before described" in the act, they are liable to the duty of sixpence per ton. I own I cannot bring my mind to believe that this was the intention of the legislature. It may be difficult to put any grammatical construction on the words which does not lead to this conclusion, still, I am not satisfied by the act of parliament itself, that such is the duty fixed. Some qualification must be imposed on the word "place." It must be supposed either to mean something analogous to ports properly so called, or to mean a place on the coast. I cannot think that vessels coming from inland places, which are exempted from the operation of the first part of the section of the act, which imposes a duty of twopence per ton, can be satisfactorily held to come within the latter part of the same section which charges a duty of sixpence per ton. It is absolutely necessary, in order to charge the subject with any duty, that such duty should be distinctly imposed by the legislature. Here, the duty is distinctly imposed on vessels sailing from the port of Goole, but not upon vessels sailing from Leeds. A vessel coming from Leeds does not sail from the port of Goole, but from a place called Leeds; and I am of opinion that a place of that description is not sufficiently brought within the operation of the words of this act.

PARKE, J.—The question in this case relates to two

classes of vessels, one of which trade from the port of Goole to the port of Hull, and use the harbour there, beginning and ending their voyage at Goole. Another class consists of vessels which come from Goole and end their voyage at Hull. The question is, whether both or either of these classes of vessels fall within the provision of the 42d section of the 14th *Geo. 3.* I take it to be quite clear that nothing is to be given to the Hull Dock Company, except what is distinctly made out to be within the words and meaning of the 42d section. Construing the act by this rule, it appears to me that vessels which trade to and from Goole (Goole being the terminus of the voyage), do fall within the meaning of that section.

1832.

 HULL DOCK
 COMPANY
 v.
 PRIESTLY.

First and second classes.

With respect to the question as to those vessels which take on board their cargo at Leeds, and sail from the port of Goole, I differ from my Lord. I cannot distinguish between those vessels and vessels sailing from Goole. The Dock Company, in my opinion, are entitled to the tonnage on both descriptions of vessels. With regard to the first description of vessels, the intention of the legislature, collected from the words of the 42d section, was to give a duty of twopence on all ships and vessels trading to or from any port on the east side of England to the northwards of Yarmouth and southward of the Holy Island. Goole has been recently made a port; it is admitted that this part of the 42d section applies to a port recently made, as well as to an ancient port. It is evident that Goole is a port on the east coast of England, to the northward of Yarmouth and southward of the Holy Island; the case, therefore, falls precisely within the words of the section. Consequently, with respect to all vessels which take goods on board at Goole, and afterwards sail from Goole to the port of Hull, and as to all vessels which begin their voyage at Goole and end it at the port of Hull, and *vice versa*, it appears to me that they fall within the first part of the 42d section. Then, as to the second class of vessels which take on board their cargo at Leeds and pass through

Third class.

1832.

HULL DOCK
COMPANY
v.
PRIESTLY.

Goole, they appear to me to sail from the port of Goole. A vessel might sail from the Regent's-canal through the port of London, or might take on board a cargo at Norwich, and sail from Lowestoff (as soon as that place be made a port). These vessels would be said to sail respectively from the ports of London and Lowestoff. There is one reason which occurs to me why vessels from Leeds ought to be rather the more liable to the duties of tonnage than vessels from the port of Goole. If we look at the mode in which the tonnage duty is collected, we find that the scale is in proportion to the distance. A small sum is imposed on vessels sailing from a port near to Hull, a greater sum on vessels from a distance. Those vessels which sail from Yarmouth and Holy Island, and trade constantly to Hull, will come more frequently within the docks than those which come from a greater distance; and by the more frequent repetition of their entrance into the harbour, the Dock Company will get a greater compensation in the way of tonnage: vessels which sail directly from Goole to Hull, will come more frequently into the port than those which trade from Leeds to Hull, because the voyage from Leeds to Hull is longer. If for a short trip a vessel pays a tonnage of twopence, I am at a loss to conceive why it should not pay for a longer trip. For these reasons it appears to me that the Dock Company are entitled to duties on both descriptions of vessels; on the first class, by the express words of the act; as to the second class, I have a less confident opinion, because I find that my opinion differs from those formed by the rest of the learned judges.

TAUNTON, J.—There are four cases stated in which tonnage duties are claimed. In the two first cases the vessels took on board goods at Goole; in one instance the whole cargo, and in the other a part. I am of opinion that on these vessels the duty attaches. This opinion is founded on the reasons stated by my Lord and my brother *Parke*, viz. that these two vessels came within the literal

First and second classes.

meaning of the first item of charge in the 42d section of the act. That these vessels do come within the literal meaning of the section is owing altogether to the accident of Goole having been made a port.

1832.

 HULL DOCK
 COMPANY
 v.
 PRIESTLY.
 Third and
 fourth classes.

With respect to the other two classes of vessels, I am of opinion that tonnage duty is not demandable. One of the vessels took on board its cargo at Leeds, and proceeded to the port of Hull, came into the harbour there, and unloaded and delivered its cargo at the quay of Messrs. *Tomlinson and Theobald*. The other vessel came into the harbour of Hull, and there within the port loaded and took on board from the same quay its cargo, and proceeded on its voyage to Leeds, passing through the entrance basin of the docks at Goole. This is the converse of the other case. All that either of these vessels did was to pass through the entrance basin of the docks at Goole, without appearing to have made a rest there even for an hour.

The tonnage is claimed on the third item of charge in the 42d section, which is thus worded: "For every ship or vessel trading between the said port of Kingston-upon-Hull and any other port or place in Great Britain, not before described, for every ton the sum of sixpence." The question is, whether these vessels, merely passing through the entrance-basin of Goole, can be said to trade between the port of Hull and the port of Goole. The word "place," here, must be considered as referring to a place *ejusdem generis* with port, that is, a place situate on the coast. The affixing of this meaning to the word "place" will exclude Leeds from that item of charge. I am clearly of opinion that a vessel cannot be said to trade between Goole and Hull merely because the vessel sailed through the entrance basin at Goole.

Nor do I think these vessels come within the first item in the 42d section. The words of that section are, "For every ship or vessel coming to or going between the port of Kingston-upon-Hull and any port of a certain description; within which description, it is admitted, the port of

1832.

 HULL DOCK
 COMPANY
 v.
 PRIESTLY.

Goole comes. The port of Hull and the other port must be intended to mean the *terminus a quo* and the *terminus ad quem* the voyage is made. It cannot be said because a vessel, in its passage from Leeds, happens to pass through the entrance basin of the port of Goole, that it is therefore coming to or going from Hull to Goole (the port of Goole not being in any sense the port or place of its destination). I think therefore the tonnage duty attaches on the two vessels first named in the case, but not on the two secondly named in the case.

Imposition of
 burthens must
 be distinctly
 enacted.

Third and
 fourth classes.

"Place."

Vessel passing
 through mouth
 of port of
 Goole.

First class—
 Vessels from
 Goole.

PATTESON, J.—I am entirely of the same opinion. This act of parliament enables a particular company to take certain dues and tonnage on certain vessels; and it has always been held that statutes which lay a burthen on any person whatever must show, by clear and distinct words, that a charge is imposed. I cannot find in this act of parliament any words which are applicable to what may be called the inland navigation between Hull and any places up the river. The only word apparently applicable is the word "place;" but taking that word in conjunction with the words with which it is placed, it seems to me quite clear that it was not contemplated to fix any tonnage whatever on vessels which sailed between Hull and other places up the river, as Selby and Leeds. I do not see how it is possible to fix a charge on a vessel coming from Leeds to Hull, merely because it happens to pass through the mouth of the port of Goole. If the vessel would not have been chargeable by passing through the entrance basin at Goole before that place became a port, it cannot be chargeable since that event.

With respect to the vessels which come from Goole itself and take in their cargo or any part of their cargo, the words in the act of parliament are clear and distinct: for Goole is now made a port; it is a port to the northward of Yarmouth and to the southward of the Holy Island. The argument adduced by the counsel for the plaintiff

goes too far; because it would extend to ports on the other side of the kingdom, as, for instance, to Liverpool or any place quite westward. The first item in the 42d section of the act must refer to a port which has its sea-mouth, if I may so call it, to the eastward of Hull, that is to say, on that side of the kingdom. Such being the construction of the first class of cases mentioned in the 42d section, Goole is included in the first class.

1832.
HULL DOCK
COMPANY
v.
PRIESTLY

Judgment, as to the two first-named vessels,
for the plaintiff.

As to the third and fourth vessels,
for the defendant.

MAFFEY v. GODWYN.

THIS was a motion for an attachment of the plaintiff for the non-performance of an award. An action of assumpsit was commenced by the plaintiff against the defendant; the declaration was filed in Hilary term, 1828, and by consent of parties afterwards, on the 17th August, 1829, an order was made by Mr. Justice *Littledale*, whereby all matters in difference between the parties were referred to arbitration, the costs of the suit to abide the event. On the 29th October, 1829, the arbitrator made his award, and decided that the plaintiff had no ground of action. In Michaelmas term, 1829, the order of reference was made a rule of Court. On the 30th of December, 1829, the defendant died intestate. On the 30th January the costs of the suit were taxed at 133*l.*, and on the 1st June, 1830, administration of the defendant's effects was granted to *Sarah Godwyn*, his widow. The plaintiff was served with a copy of the rule of Court, and with the master's allocatur, and payment was demanded on behalf of the administratrix on the 29th of September, 1832.

The death of the defendant after the making of an award in pursuance of a rule of Court, where no verdict or judgment has been entered up, abates the suit; and the Court will not enforce the performance of the award by attachment.

1832.

MAFFEY
 v.
GODWYN.

In the early part of this term *Barstow* obtained a rule nisi for an attachment against the plaintiff for the non-payment of 138*l.*, the defendant's taxed costs upon the rule of Court.

W. Erle now shewed cause. The suit in this case has abated by the death of the defendant. The order of reference was made simply of all matters in difference before any interlocutory judgment, and no verdict has ever been entered up in this cause. The first point to be submitted to the Court is, that the affidavits upon which the rule nisi was obtained, being entitled in the cause of *Maffey v. Godwyn*, are made in no cause whatever. (Here he was stopped by the Court.)

Title of affidavits.

Barstow, *contra*. The objection just taken involves the whole question. In the Michaelmas term, after the making of the award, the order was made a rule of Court. The defendant was, during Michaelmas term, alive, and the plaintiff was entitled, during that time, to move to set aside the award if he had been dissatisfied with it. After that term nothing remained to do but to tax the costs. The taxation must be considered to have reference to the term in which the order was made a rule of Court. If an action be brought and a rule to compute is made final, judgment may be entered up in a subsequent term as of the preceding term, and may be declared on as such; and the analogy, drawn from writs of execution, tested in term before the death of parties, but issued after their death, is also applicable. Now as to the argument that the suit is abated. A suit is abated by the death of the party for all purposes of establishing a liability not previously existing, but not for the purpose of giving effect to previous rights or previous liabilities, if they have been established and completed by a judgment. [*Parke, J.* You are not deprived of your remedy by action.] The remedy by action may exist, but that does not destroy the remedy by attachment. The case of *Rogers*

Abatement of suit.

Attachment.

v. Stanton (a) is expressly in point. In that case it did not even appear that the party had lived an entire term after the award was made, or that the submission was made a rule of Court in the lifetime of the party applying for the enforcement of the rule. [*Denman*, C. J. If the award in that case directed the money to be paid to the executors, there was a contempt in not paying.] The award directed the money to be so paid, but it does not appear that the submission authorized such a decision. No incongruity will appear on the face of the proceedings in this case, if the attachment be granted, as the form of the attachment is in general terms, and does not state the names of the parties. [*Denman*, C. J. How do you dispose of the question as to the title of the affidavits?] That, again, is the very point in dispute. There is no doubt that an indictment for perjury would lie upon these affidavits. It is the daily practice to make orders (to tax attorneys' bills, for instance,) in causes which have long ceased to be depending.

DENMAN, C. J.—You have no remedy but by action.

PARKE, J.—If the suit abate' there is a difficulty in enforcing a rule of Court made in the cause. In the case of *Rogers v. Stanton*, the point concerning the abatement of the suit was not fully considered by the Court.

Rule discharged, without costs.

(a) 7 Taunt. 575.

1832.
MAFFEY
v.
GODWIN.

1832.

HEATH v. SANSOM and EVANS.

A partnership, general in point of duration, may be dissolved at any time, (as to future transactions,) and such dissolution need not be published or communicated to exempt a retiring *dormant* partner from liability to subsequent engagements, as the making of a promissory note, in the name of the ex-firm.

ASSUMPSIT upon a promissory note by indorsee against makers. *Sansom* suffered judgment by default; *Evans* pleaded non-assumpsit. The note, dated 1st July, 1827, was drawn by *Sansom* and Co. for 300*l.* payable two months after date to the Droitwich Patent Salt Company, or order, and was indorsed by the payees to the plaintiff.

At the trial of this cause before Lord *Tenterden*, C.J., at the sittings at Westminster after Easter term, 1830, the following facts appeared: *Sansom* and *Evans*, the defendants, were partners in alum works carried on at Bristol; *Sansom* was the agent of and a partner in the Droitwich Salt Company. At the time of the date of the note *Sansom* was indebted to the Company; to discharge his debt to them *Sansom* gave the company the promissory note upon which this action was brought. Verdict for the plaintiff, with leave to move to enter a nonsuit. A rule to this effect was made absolute (a) for a new trial only (b), which came on at the sittings after H. T. 1832, before Lord *Tenterden*, C.J. In addition to the facts proved at the former trial, it was shewn on the part of the plaintiff, that from the date of the note down to the commencement of the action, the Company was indebted to the plaintiff in more than the amount of the note, upon a running account for coals supplied by him; and on the part of the defendants it was proved that in January, 1829, the defendants empowered one *Price* to settle all matters in difference between them, respecting their partnership affairs, with authority to dissolve the partnership, who, however, never dissolved the partnership, or made any award in the matter referred to him; that in April, 1809, it was agreed that the copartnership stock in trade should be taken at the highest bidding which either of the defendants should transmit to him (c); but that

(a) 2 Barn. & Adol. 291.

(b) *Vide* 6 Mann. & Ryl.

(c) This mode of disposal, by

licitation, as it is called, i. e. by auction amongst joint-owners, is frequently adopted in the civil law.

no final settlement of the partnership accounts took place. Lord *Tenterden*, C. J. in his direction to the jury, told them that what was done by *Price* was preparatory to a dissolution, and that there was in this case, in fact, no dissolution of partnership. The jury accordingly found a verdict for the plaintiff. In Easter term last, *Bompas*, Serjt., obtained a rule nisi for a new trial, on these grounds: that there was no evidence that the note had been indorsed to the plaintiff before it became due, or on account of the debt owing to him from the Company; and that after the agreement to refer the partnership affairs to *Price*, *Sansom* had no authority to bind *Evans* by drawing a bill of exchange or note; still less after the disposal of the partnership effects in April.

1832.
HEATH
v.
SANSOM.

Sir *James Scarlett* and *Hoggins* now shewed cause. The note came into the hands of the payees, the *Droitwich Company*, in the regular course of business, and after verdict it must be presumed that the note was paid by the Company in discharge of their debt to the plaintiff. It was shewn that at the time the note came into the hands of the Company they were indebted to the plaintiff, and that this note was indorsed by them to the plaintiff. The presumption is obvious. As to the second point, Lord *Tenterden* expressly told the jury that *Price's* evidence only shewed that measures had been taken preparatory to a dissolution of partnership; that there had, in fact, been no dissolution. This case is distinguishable from *Carter v. Whatley (a)*, which was cited at the trial: in the latter case credit was given to the firm after one partner had retired, and there had been, as to him, a dissolution of partnership. Here, there has been no dissolution; no notice was given to the company of the intended dissolution, and it was not shewn to be a secret partnership.

First point—
Consideration.

Second point
—Authority.

Bompas, Serjt., in support of the rule. When the new trial was granted, on the former application to the Court, the plaintiff undertook to prove the consideration, which he has failed

First point.

(a) 1 B. & Adol. 11.

1899.

HEATH

v.

SANSON.

Second point.

to do. The bare fact of an indorsement raises no presumption in favour of its having been made before the note became due, *Ross v. Rowcroft* (a). As to the second point, *Evans* was a *dormant* partner. The partnership, although not determined by the reference of the partnership accounts to *Price*, was dissolved when the stock in trade was purchased by *Sansom*. This was previously to the drawing of the note. Any dissent by a *dormant* partner to participate in the profits of the business, is a dissolution of the partnership. The question therefore is, at what period *Evans* ceased to participate in the profits of the concern? He cannot have received any profits after the stock was purchased by *Sansom* in April. Assuming that the partnership was not dissolved, the authority to draw bills was suspended.

DENMAN, C. J.—The Court consider that the defendant is entitled to a new trial, on the second ground on which the rule nisi was granted. It is therefore unnecessary to consider whether the plaintiff was bound to produce further evidence of the consideration given for the note. *Evans* was connected with the firm of *Sansom* and Co., as a *dormant* partner. In January, the partnership affairs were referred to an arbitrator. What took place in April amounted to an agreement that the partnership should be put an end to. *Sansom* was therefore no longer a partner with *Evans*. He had no authority from *Evans*, nor was there any privity between *Evans* and *Sansom* to enable the latter to bind *Evans*, by drawing a promissory note.

PARKES, J.—I am of opinion that the verdict should be set aside, and that a new trial should be granted in this case. The new trial on the former occasion was granted generally; it was therefore competent for the defendant to prove, on the second trial, that the partnership had been dissolved before the drawing of the note. It has been settled by the cases of *Peacock v. Peacock* (b), *Featherstonhaugh v. Fen-*

(a) 4 Campb. 215.

(b) 16 Ves. Jun. 49.

wick (a), that a revocation of a partnership (where there is no agreement as to the continuance of the partnership) may take place between the parties at any time, and that it is not necessary to have a formal dissolution. The partnership affairs were referred to an arbitrator. The meaning of this agreement is very doubtful and obscure. To interpret it we must look at the conduct of the parties (b). The arbitrator disposes of the stock in trade to *Sansom*, who takes possession. It could not be the intention of the parties after this, that *Evans* should continue to be bound in respect of the partnership. The parties intended that the partnership should be dissolved as between themselves. In my opinion there should be a new trial on this ground; I offer no opinion on the other point, that there was not at the trial sufficient evidence of the consideration given for the note.

TAUNTON, J.—I am also of opinion that *Evans* was a dormant partner, whose name never had been published to the world, and that his liability ceased as soon as the partnership was put an end to. Although by entering into this partnership *Evans* clothed *Sansom* with an authority to bind him by drawing bills and notes, he might divest him of that authority by any act dissolving the partnership. *Sansom* became the purchaser of the stock in trade, and after that period conducted the business for his own benefit and emolument. The implied authority given by *Evans* ceased upon that arrangement being entered into. Upon this ground only, I think there should be a new trial.

PATTESON, J.—*Evans* was a dormant partner; and the question is, whether, in April last, he did not put an end to the partnership. It is evident, from the whole of the facts, that *Sansom* was to be solely interested from that period. For this reason I think there should be a new trial.

Rule absolute.

(a) 17 Ves. Jun. 298.

(b) Vide *Wardley v. Bayliss*, 5

Taunt. 752. But see *Clifton v.*

Walmsley, 5 T. R. 564.

1832.

The application under 41 Geo. 3, c. 23, s. 8, to refund money obtained by a wrongful distress for poor-rates, can be made only at the same sessions at which the rate is reduced and amended.

The KING v. Justices of ST. PETER'S Liberty, YORK.


IN August, 1828, the churchwardens and overseers of the poor for the township of Brotherton, in the liberty of St. Peter, York, made a rate for the relief of the poor, in which the undertakers of the Aire and Calder navigation were rated in respect of the navigation in the said township as follows:—"Cut or caual, and that part of the River Aire lying within the township of Brotherton, dam, locks and weirs, tolls, dues or rates, at 2,000*l*." Against this rate the Aire and Calder Company appealed, and a case was granted by the Court of Quarter Sessions for the opinion of the Court of King's Bench. The appeal against this rate had been entered at the October and respited until the Christmas Sessions; but of the entry and respite the overseers of Brotherton had no notice in writing. They obtained a warrant of distress in the December following for the amount of the rate, 150*l*., and seized a vessel belonging to the company. To prevent a sale of the vessel, the company, under a protest, paid the 150*l*. with the costs of the distress, amounting together to 163*l*. 3*s*. 3½*d*. Five other rates were subsequently made while this case was pending, and appeals were lodged against them. The Court of King's Bench (a), upon hearing the argument on the case reserved, decided that the company were not rateable in respect of the river, and sent the rate back to the sessions to be amended. After the decision of the Court of King's Bench, an appeal came on to be heard against a rate made on the 27th March, 1829, upon which the Court of Quarter Sessions altered the rates, by striking out of it the words "the River Aire," but increased the amount to 2,010*l*. 2*s*. 8*d*. Upon this, another case was sent for the opinion of the Court of King's Bench, as to whether the company were rateable in respect of the dams on the river.

(a) 4 Mann. & Ryl. 820; 9 Barn. and Cress. 728.

On the 21st January, 1832, the Court of King's Bench made a rule that the order of sessions should be quashed for insufficiency, and that the sessions should amend the rate by rating the Aire and Calder Company upon the sum of 15*l.* 16*s.* in lieu of the sum of 2,000*l.*, increased by the said order of sessions to 2,010*l.* 2*s.* 8*d.* for and in respect of the canal and lock within the said township, and the tolls and dues received in respect thereof. At the April sessions, 1832, the justices altered all the rates, including the one made on the 5th August, 1828, from 2,010*l.* 2*s.* 8*d.* to 15*l.* 16*s.* according to the rule of Court. The overseers were entitled to about 12*l.* 0*s.* 6*d.* for the whole of the assessments, and a demand was made upon the overseers of the township of Brotherton for the difference between the amount of the rates due from the company, and the sum received by the overseers under the distress in April. At the October sessions an application was made to the Court of Quarter Sessions on behalf of the company, for an order for the overseers of Brotherton to refund the money paid to them, after deducting the amount of the several rates chargeable upon the company. The Court of Quarter Sessions refused the application, on the ground that the Court had not jurisdiction to grant an order for the re-payment of the money. In the early part of this term, *Wightman* obtained a rule *nisi*, calling upon the justices to shew cause why a mandamus should not issue, commanding them at the next general quarter sessions for the said liberty to hear and determine the application of the said company, and to order the re-payment to them by the overseers of Brotherton, of the sum of 163*l.* 3*s.* 3½*d.*, deducting such sum of money as might be due from the company for the rates reduced in pursuance of the order of Court, together with all reasonable costs.

Alexander, with whom was *Bliss*, now shewed cause. The application for an order of sessions was made too late.

1832.
The KING
v.
JUSTICES OF
YORK.

1832.

 The KING
 v.
 JUSTICES OF
 YORK.

The Court of Quarter Sessions had ceased to have any jurisdiction, and therefore the Court cannot grant a mandamus in this case.


The rate in question was amended at the April sessions, 1832, and the application for the order of re-payment was not made until the October sessions following. Now the 41 *Geo. 3*, c. 23, s. 8, upon the construction of which this point entirely depends, empowers the same Court of Quarter Sessions which hears the appeal and amends the rate to make the order of re-payment; but it does not empower any subsequent Court to make such order. That such was the intention of the legislature appears obvious both from the use of the phrase "the said Court," and from the power that is there given to award reasonable costs to the rated parties; for how can any sessions determine what shall be considered reasonable costs, except those sessions which heard the circumstances of the case, and directed the amendment.

It is another objection to the present application, that no continuances have been entered in the Court below, wherefore its jurisdiction has long been at an end. During the pendency of the case before this Court, it may be admitted that continuances were not necessary; but after the next subsequent sessions they became so, and not having been entered, the sessions ceased to have jurisdiction (*a*). It may be said that this Court has the power to direct them to be entered, but the rule does not pray the exercise of such a power.

The real remedy of the Aire and Calder Company was under the 7th sec. of 17 *Geo. 2*, c. 38, which gives the right of appealing against a distress for rates. But having allowed the time to pass by when that remedy was available, they cannot now be permitted to excuse their own laches, and must sustain its consequences. The company may also,

(*a*) See 2 Nolan P. L. 535, 549.

perhaps, have another remedy by way of action against the overseers for money had and received. If this be so, the mandamus cannot be granted, since it is an acknowledged rule of this Court not to grant a mandamus in cases where any specific legal remedy exists; *Rex v. Bishop of Chester (a)*.

1832.

 The KING
 v.
 JUSTICES OF
 YORK.

Sir J. Scarlett *contra*, with whom were F. Pollock and Wightman. This application was within the spirit of the statute, which was made for the purpose of relieving persons who have been overcharged and paid a greater sum for rates than was really due from them. The act ought to be construed liberally, and the words "the said sessions," should be considered as referring to the Court of Quarter Sessions generally. There will, in this case, be great difficulty in enforcing any other remedy.

By the Court.—Upon reading the eighth section of the act we are clearly of opinion that the application should have been made to the same sessions at which the rate was amended and reduced, in pursuance of the rule of this Court. We think that the jurisdiction of the Court below expired with the April sessions.

Rule discharged.

(a) 1 T. R. 396.



1832.



The KING, on the Prosecution of ELIZABETH DAVIES,
v. the HUNGERFORD MARKET COMPANY.

Under an act incorporating a Company for the erection of a market, and authorizing them to purchase certain scheduled hereditaments, and to give a notice to parties interested to send in their claims, and directing that in case of non-acceptance of the terms offered by the Company, the value shall be assessed in a certain mode: the Company cannot, after giving the notice, abandon the purchase.

In such a case the Court granted a mandamus for the issuing of the statutory process to assess the value.

BY the Hungerford Market Act, 11 *Geo.* 4, c. 70, certain persons were incorporated by the name of "The Hungerford Market Company." By the second section, the Company was empowered, when they should have purchased the Hungerford estate, to treat for the hereditaments mentioned in the first schedule annexed to the act, or so many or such part thereof as the Company should think proper to be taken. By the 6th section it was provided, that if any person interested in any hereditaments in the first schedule mentioned, or any occupier thereof, should, for the space of twenty-one days next after notice in*writing signed by the clerk of the Company, neglect or refuse to treat for the sale of the premises, then the Company should cause the value and recompense to be made for the said hereditaments, to be ascertained by a jury of the city of Westminster; and the Company was empowered to issue a warrant under their common seal to the high bailiff of Westminster, requiring him to impanel, summon, and return a jury. By the 7th section, the verdict which the jury should give was declared to be final, and all persons interested in such hereditaments were to be thenceforth divested of all right to the same; and upon payment of the purchase money, the Company was to be deemed to be in the actual seisin and possession of the said hereditaments to all intents and purposes whatsoever. By the 10th section it was provided, that, upon the payment of such sum of money as should have been assessed by such jury as aforesaid within one calendar month next after the same should have been so assessed, or upon payment thereof within one calendar month, into the Bank of England, as thereafter directed, it should be lawful for the Company to enter into such hereditaments; and that thereupon such hereditaments should thenceforth become the sole property of the said Company.

And by the 14th section it is enacted, that in case the person to whom any sum of money shall be assessed for the purchase of any hereditaments, shall, for the space of 14 days after notice thereof, neglect to accept the same, it shall be lawful for the Company to order the sum so assessed to be paid into the Bank of England, to be placed to the account of the party interested.

1832.

 The KING
 v.
 HUNGERFORD
 MARKET
 COMPANY.

Mrs. *Elizabeth Davies* was possessed for the residue of a term of twenty-four years, commencing on the 29th of September, 1822, at the rent of 52*l.* 10*s.*, of a public house called the Ship, in Charles Court. This was part of the property contained in the 1st schedule of the act. On the 20th of December, 1831, Mrs. *Davies* received from the attorney of the Hungerford Market Company a letter, in which he stated that the Company required to purchase and take, for the purposes of the act, the public house in Charles Court, and requested to be informed what Mrs. *Davies* required to be paid for her interest in the premises. On the 18th of January, 1832, the attorney of Mrs. *Davies* wrote to the Company, and informed them that Mrs. *Davies* proposed to refer the price of the house to two surveyors. On the 3d of April the attorney of the Company informed the surveyor of Mrs. *Davies*, that the public house would not be wanted by the Company, as the owner of the freehold of the house required more for his interest than the Company were willing to give. On the 26th of February, 1832, Mrs. *Davies* received a written notice from the clerk of the Company, stating, that the Ship public house was required for the purposes of the act, and that it was the intention of the Company to contract for the purchase thereof and of all leases thereon, and that if she did not, within twenty-one days from the date thereof, contract and agree with the Company for the sale of her interest in the premises, it was the intention of the Company to issue their precept to the high bailiff of Westminster, to empanel a jury, to ascertain the damages to be given to her by way of compensation, for her interest in the Ship public house. The Com-

Title of prosecu-
 cutrix.

Treaty for
 purchase.

Notice of in-
 tention to pur-
 chase.

1839.

 The KING
 v.
 HUNGERFORD
 MARKET
 COMPANY.

pany subsequently refused to purchase the house. In Trinity Term last, *Kelly* obtained a rule nisi for a mandamus, commanding the Hungerford Market Company to issue their warrant under their common seal, directed to the high bailiff of the City and Liberty of Westminster, to empannel a jury for the purpose of assessing the damages to be given by way of compensation to Mrs. *Davies* for her interest in the public house, and for the goodwill of the trade attached thereto.

Sir *James Scarlett* now shewed cause. The property belonging to Mrs. *Davies* is not now wanted by the Company for the purposes of the act. It is optional on their part to purchase or not any part of the property specified in the first schedule. This is an attempt to force the Company to purchase this property, whether they require it or not. There is no clause in the act making it compulsory on the Company to buy. The Company have offered and are ready to pay any reasonable expenses which Mrs. *Davies* may have incurred, in consequence of the notice that the Company intended to purchase.

F. Kelly and *Channell*, in support of the rule. The notice is as binding upon the Company as on the parties to whom it is addressed. Under ordinary circumstances an agreement is entered into by the two parties, and both are equitably bound. Here nothing of that kind is required. The act gives a mere statutable and a very extraordinary mode of contracting. By the second section, the Company are empowered to purchase. By the third section, a short and peculiar form of conveyance is given. Thus the Company are not obliged to resort to the ordinary and expensive modes of conveyance. The 5th section enables bodies politic and every description of persons to sell. By the 6th section, if any one refuses to treat, 21 days after notice given by the clerk of the Company, a jury may be summoned to assess the damages; and by section 7, im-

mediately after the jury have given their verdict, the property is absolutely vested in the Company. Without any previous agreement with the party interested, the Company, upon finding that any particular property mentioned in the schedule is requisite for the purposes of the act, are empowered to give a notice, by which the owners are so far divested of their right, that they are unable to sell or dispose of the estate. If *Mrs. Davies* had been, after the notice, offered ten thousand pounds for her interest in the public house, it would have been entirely out of her power to sell. *Mrs. Davies* knew, that upon the delivery of the notice her right was gone, and consequently sold off a part of her stock. Can it be said that the Company alone are not bound by the notice? By delivery of such notice they gain all the benefits of a contract, and ought to be subject to any disadvantages that may be consequent upon it. If the Company are not bound by the notice now, can it be withdrawn at any time before or after verdict? The statute directs, that upon disagreement the Company *shall* proceed to require a jury to be summoned. The word *shall* makes it imperative on the Company to do so. After delivery of notice the parties knowing that they are conclusively bound by it, withdraw, take other premises, and remove their stock, and yet if the construction contended for be correct, the Company have the power at any time to rescind a contract which is binding upon the other party. It is impossible to suppose, in the absence of evident expressions to that effect, that the legislature could have intended that the Company should have an arbitrary power of making persons sell their property, whether they are willing to do so or not, and yet, that after the Company had taken the measures by which this extraordinary power is to be exercised, and they had bound the other parties, they should be at liberty to treat their acts as a nullity as far as regards themselves.

DENMAN, C. J.—The Company have obtained an act of parliament, which gives them great advantages, and very

1832.
The KING
v.
HUNGERFORD
MARKET
COMPANY.

1832.
The KING
v.
HUNGERFORD
MARKET
COMPANY.

considerable powers. I do not think that upon a disagreement as to the amount of the compensation to be given, they are at liberty to countermand the notice, and rescind the contract. The act authorizes the Company to summon a jury for the purpose of assessing the damages, but does not give them any power to countermand the notice. The act cannot have meant that the Company, after entering into an agreement, binding upon the individuals contracted with, should be at liberty to rescind the contract at their own pleasure. If that were so, the owners and occupiers of the various properties mentioned in the first schedule of the act would be entirely at the mercy of the Company.

PARKE, J.—I am of the same opinion. The act has given to the Company the option to purchase all the premises mentioned in the schedule. The question is, what shall be considered as declaratory of the option to purchase. I think the option is declared when the notice is given. This, I think, is the true construction to be put upon the 6th section. The Court came to a similar decision in the case of *The King v. Market Street Company, Manchester*, which is not reported. That case was decided upon the general purview of the act; and though the circumstances of the two cases are not precisely the same, yet in principle they are alike.

TAUNTON, J., and PATTESON, J., concurred.

Rule absolute.




BULWER v. HORNE and others.

1832.

ASSUMPSIT. The first count in the declaration stated, that the defendants were the proprietors of a coach from London to Cheltenham; and that in consideration that the plaintiff would engage a place in the coach from London to Cheltenham, the defendants promised to carry him in the coach; that the plaintiff accordingly took a place, and requested the defendants to carry him, which they refused to do. The second count stated the same contract more generally, and to this was added the common money counts. The defendants pleaded the general issue, except as to 1*l.*, parcel of the several sums of money in the third and subsequent counts of the declaration mentioned, and as to that sum, a tender. The replication took issue on the tender. The defendants, on the same day upon which the plea was delivered, instead of paying the money into Court on the plea of tender, obtained a rule for the payment of 1*l.* into Court. The cause came on to be tried before *Parke, J.* at the sittings at Westminster, in Hilary term, when the jury found a verdict for the defendants. The learned Judge, however, upon seeing the rule for payment of money into Court, was of opinion, that the payment of money into Court generally admitted the whole of the declaration, and accordingly directed a verdict to be entered for the plaintiff, giving the defendants leave to move to enter a nonsuit. In Hilary term a rule nisi to enter a nonsuit was obtained for the defendants upon affidavits, which stated that a previous irregularity had been waived by the defendants' attorney, and that it was understood, "that the cause should proceed to trial on its merits, and that no advantage should be taken of the proceedings on either side."

Plea of tender, and an order procured to pay money into Court generally:—
Held, that the payment of the money under this order is an admission of the cause of action stated in the declaration, and that the plaintiff is entitled to a verdict accordingly.

F. Pollock and *Hoggins* now shewed cause. The affidavits upon which this rule was obtained cannot be read. On

1832.

 BULWER
 v.
 HORNE.

a motion like this, no affidavit can be read. The order for payment of money into Court was binding upon both parties. [*Parke, J.* No affidavit of this kind can be read (a).]

Sir J. Scarlett and Curwood contra. The money must be considered to have been paid into Court on the plea of tender. The order of Court is not conclusive, for an admission by a party may be contradicted.

PARKE, J. (b)—A rule to pay money into Court has the effect of admitting conclusively the contents of the declaration. The money is paid generally into Court, and must be considered as an admission of the special contracts stated in the declaration. The defendants would have taken the benefit of the rule, and they must abide by the consequences of having paid the money into Court. I confess I would rather not have seen this objection taken.

TAUNTON, J.—I am of the same opinion. Great inconvenience would result if the order of Court were not considered as binding between the parties in the suit.

PATTESON, J. concurred.

(a) As to affidavits *against* the commencement of the term, before rule, *vide* 1 Mann & Ryl. 393 (a). *Denman, C.J.* had taken his seat in the Court.
 (b) This case was argued at the

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The KING *v.* The Inhabitants of CLIXBY.

A person who served the office of pinder in 1825, where no previous appointment to the office, gains no settlement under 3 & 4 Will. 3, c. 11.

Quere, whether the office of pinder is an annual office within the meaning of that act.

UPON appeal against an order of two magistrates, by which *William Clayton*, his wife and two children, were removed from the parish of Caiston to the parish of Clixby, both in the parts of Lindsey, in the county of Lincoln, the

quarter sessions confirmed the order, subject to the opinion of this Court upon the following case:

Clixby belongs, with the exception of about 20 acres of land, to one proprietor, Mr. *Hannam*. There are nine occupiers of land in Clixby, including Mr. *Hannam*, who retains some portion of his estate in his own hands. He holds no courts. Previously to the year 1825, there never had been a pinder in Clixby, as far as appeared from the evidence. The pauper, who was the only witness examined, stated that he had known the place thirty-three years, and had never known or heard of any pinder there previously to 1825. In the year 1825 Mr. *Hannam* and two other occupiers of land in Clixby, of whom *Lawrence* was one, ordered the pauper to go and be sworn in pinder. It did not appear in evidence that there was any public meeting of the parish, or any other meeting, to appoint him. The pauper went with the said *Lawrence*, constable of Clixby, to a justice of the peace and was sworn in. He impounded cattle in Clixby that year, and continued to do so for several years till he was removed. In 1826 the pauper was again sworn in before two justices of the peace. During all this time he resided in Clixby. The sessions found that this was a public annual office.

The question for the opinion of the Court of King's Bench is, whether by such service and swearing in, the pauper gained a settlement in Clixby.

Clinton and J. Hildyard. The question will be, not whether there was a legal appointment, but whether the pauper actually served the office of pinder, as the sessions have found that it is an annual office. During the last thirty-five years no such officer has been appointed; but still the pauper was sworn in by the justice, who is the proper person for that purpose if there be no court leet; and the serving of an office, if there be only a colourable appointment, is sufficient; *Rex v. Ilminster* (a); *Rex v. Corfe Mullen* (b); *Rex v. Stogursey* (c).

(a) 1 East, 83.

(b) 1 B. & Adol. 211.

(c) Ibid. 795.

1892.
 The King
 v.
 Clixby.

Whitehurst contra. First, the office of pinder is not in any case an annual office within the statute. Secondly, assuming that it may be an office under the statute, yet in *Clixby* there is no such office: and thirdly, supposing it to be an office, and an annual office, there was not in this case any sufficient appointment. The office of pinder does not exist in every parish. He is employed to take care of the lord's waste, and is in fact the mere servant of the lord; *Vaspor v. Edwards* (a). There is a distinction between an office and employment; thus, the governor of a work-house does not, it was held, gain a settlement by holding that situation, for it is an employment, and no office, though connected with the parish; still less ought a person to do so, who is merely the servant of the lord. In the case of the aleconner, he was stated to be an officer having judicial powers, an ancient officer. Here the case finds that it was a new office, created a few years ago by private individuals, which cannot be done, nor does the finding of the sessions, that it was an annual office, preclude the appellants from now disputing it.

By the COURT.—The sessions have found that this is an annual office, but that finding is subject to the opinion of this Court, upon the facts as stated. It is unnecessary to determine whether or not a pinder is an annual officer. It does not appear that here there was an officer of this description previously to 1825. There was, therefore, no such office in *Clixby*. The case of the hog-ringer is very different. This case falls very far short of that.

Order of Sessions quashed.

(a) 12 Modern, 658; S. C. 11 Mod. 21; 1 Salk. 248; Holt, 256; 1 Ld. Raym. 719.

The KING v. The ST. KATHARINE DOCK COMPANY.

1832.

BY 6 Geo. 4, c. 105, the St. Katharine Dock Company was incorporated and empowered to sue and be sued in the name of their treasurer for the time being. Two actions were commenced, one by *George Carr Glyn*, as treasurer of, and on the behalf of, the Company, against *Thomas Corpe*, and the other by *Corpe* against *Glyn* as such treasurer, for certain sums of money alleged by *Corpe* to be due to him from the Company. Whilst these two actions were pending, an order was made by Lord *Tenterden*, on the 8th of July, 1832, to refer all matters in difference between the said parties to a barrister, with power to order what he should think fit to be done by the parties respecting the matters in dispute, the costs of the causes, and of the reference and award, to be in his discretion; which order was on the 31st of January, 1832, made a rule of Court. The arbitrator awarded, that *Corpe* had good cause of action against *Glyn* as such treasurer for 2560*l.* 19*s.* 11*d.*, and that *Glyn*, as such treasurer, should pay to *Corpe* on demand the said sum of 2560*l.* 19*s.* 11*d.*, together with the costs of such action. And as to the other action, the arbitrator awarded, that at the time of the commencement thereof, *Glyn*, as such treasurer as aforesaid, had not any cause of action against *Corpe*, and that the costs thereof should be paid by *Glyn*, as such treasurer, to *Corpe* on demand. And he awarded, that the costs of the award and reference should be paid by *Glyn*, as such treasurer, to *Corpe* on demand. This award was afterwards made a rule of Court. The costs of *Corpe* in the two actions, and of the award, were afterwards taxed at the sum of 300*l.* The several sums of 2560*l.* 19*s.* 11*d.*, and 300*l.* being unpaid, a mandamus was obtained by *Corpe* in

Where an act incorporating a company directs that actions in respect of claims upon the company shall be brought against the treasurer, but that his effects shall not be taken in execution, a mandamus will issue to the directors, &c. of the company, commanding them to pay money recovered in such an action.

In shewing cause against a rule for quashing a return to a mandamus, the defendant may object that the writ was improperly issued.

A rule for quashing a return to a mandamus, need not go into the crown paper.

Where cross actions and all matters in difference are referred to arbitration,

and the award decides the actions only, it is no objection to the award that a claim, not included in either action, was brought before the arbitrator upon which he has not adjudicated, unless it be also averred that he did not take such claim into his consideration.

1832.


 The KING
 v.

 ST. KATHARINE DOCK
 COMPANY.

 RETURN TO
 MANDAMUS.

 Covenant be-
 tween defend-
 ants and pro-
 secutor.

Breach.

 Notice to
 arbitrator.

Trinity term last, directed to the treasurer and directors of the St. Katharine Dock Company, calling upon them to pay these two sums. To this writ the treasurer and directors of the St. Katharine Dock Company returned, that by indenture made the 31st day of March, 1829, between five of the directors of the St. Katharine Dock Company of the one part, and *Corpe* of the other part, *Corpe* covenanted with the directors, that he would, in a good, lasting and workmanlike manner, build and complete certain wharf walls, and make the coffer dams and other dams necessary for the proper construction of the same, and find and provide the requisite materials according to the directions and instructions expressed in the said indenture, and would duly complete, in manner therein mentioned, the east wall within two calendar months, and the west wall within four calendar months from the day of the date of the indenture. And that the said *T. Corpe* did not complete the east wall within two calendar months, or the west wall within four calendar months from &c., by reason whereof the said walls and each of them remained and were unfinished, after the periods so appointed for the completion of the same respectively, until the 10th day of April, 1830, and the Company thereby incurred great loss, and were prevented from using a certain wharf of the said Company, and lost and were deprived of divers large gains and profits which &c., and that the losses sustained by the Company, by reason of the said non-completion of the said walls, amounted to 1128*l.*; and that the said breach of covenant on the part of *Corpe*, in not completing the said walls within the periods in that behalf aforesaid, and the loss so sustained by the Company by reason thereof, were before and at the time of making the said order of reference, matters in difference between the parties, whereof the arbitrator, after undertaking the reference and before making his supposed award on the said writ mentioned, that is to say, on the 25th day of January, 1832, had notice, and was requested on behalf of the said Company to consider and

adjudicate upon the same; and evidence in proof of such non-completion of the said walls, and of the losses thereby sustained, was, before the making of the supposed award, produced before the said arbitrator. And further, that neither of the said actions was brought in respect of the non-completion of the said walls or either of them; nor was the claim of the Company in respect of the losses by them sustained by reason of such non-completion, in any manner included in the declaration of the Company, in the action commenced by *Glyn* against *Corpe*. And further, that the supposed award relates exclusively to the actions, the costs of the supposed award and of the reference, and that the arbitrator had wholly neglected in his supposed award to make any award or adjudication whatever as to the claim of the Company in respect of the non-completion of the walls. And further, that by reason of the said omissions on the part of the arbitrator the supposed award was void, and that the Company ought not to be enjoined or obliged to pay, or cause to be paid, to or for *Corpe*, the sums awarded by the arbitrator, and in and by the said writ so enjoined to be paid as aforesaid.

In Michaelmas term last a rule was obtained by *Campbell*, for the defendants, to shew cause why the return should not be quashed for insufficiency, with costs, and why a peremptory mandamus should not be awarded.

Sir *J. Scarlett* and *Platt* now shewed cause. The Court cannot decide this case on motion, it is highly expedient that the practice of the Court should be uniform; this case ought to have been set down in the crown paper.

Any objection to the writ of mandamus may be taken after the return is made; *The King v. The Margate Pier Company* (a), *The King v. Bristow* (b). The Court will not grant the extraordinary remedy of a mandamus to a party, unless he not only has a specific legal right, but also wants

1832.
The KING
v.
ST KATHARINE DOCK
COMPANY.

Evidence of
breach.

Covenant not
included in
action.

No award
upon claim.

Motion to
quash return.

First point—
Case for crown
paper.

Second point
—Mandamus
does not lie.

(a) 3 Barn. & Ald. 230.

(b) 6 T. R. 168.

1833.


 The KING
 v.
ST. KATHA-
RINE DOCK
COMPANY.

a specific legal remedy; *The King v. The Archbishop of Canterbury* (a), *The King v. The Bank of England* (b). There is in this case no want of a specific legal remedy. An action might have been brought upon the award. Although that action would have been, in point of form, against *Glyn* as treasurer of the Company, yet in substance it would have been brought against the Company, and upon the judgment obtained in that action execution might have issued against the effects of the Company.

Third point—
Return good.

Assuming that a writ of mandamus will lie, the return is good and valid. Whatever would be a good plea to an action on the award in this case would be a valid and effectual return to the writ of mandamus. *Mitchell v. Staveland* (c), is an authority to shew that the return would be a good plea to an action on the award. In that case the action was brought upon a bond, conditioned to perform an award under a reference of all matters in difference between the parties; the defendant pleaded that certain bills of exchange were outstanding, and that the indemnity of the defendant, as the drawer of such bills, was at the time of making the award a matter in difference between the parties; that the arbitrators had notice of this dispute, and had not made any award concerning the same. The Court held the plea good, although the award stated that the arbitrators had heard the allegations of the parties, and had examined all the accounts and bills of exchange, and had heard all evidence produced before them touching the matters in difference, and had awarded, amongst other things, that the plaintiff should pay to the defendant, in full of all demands, the sum of 1500*l*. In the present case the breach of the covenant respecting the making and building the walls was, at the time of the order of reference, a matter in difference between the parties; that matter in difference was notified to the arbitrator; the award is silent as to that particular matter in controversy between the parties. The supposed award, therefore, not being final, and not adjudi-

(a) 8 East, 219.

(c) 16 East, 58.

(b) 2 Dougl. 526.

cating upon all matters referred to the arbitrator, is incomplete and void.

1832.

The KING

v.

ST. KATHARINE DOCK
COMPANY.

Campbell, S. G., and Blackburne, in support of the rule. It is not necessary that a case like this should be placed in the crown paper, where the return is palpably defective. [Denman, C. J. You need not argue that objection.]

First point.

Then it is said that a mandamus will not be granted where there is a specific legal remedy. In this case, however, it cannot be said that any legal remedy exists; an action without execution is no remedy. The judgment must follow the writ, and the *fi. fa.* the judgment; the action would be brought against *Glyn*, the judgment would be entered up against him; no execution could issue against the chattels of the Company; the execution would issue against *Glyn's* effects. But the effects of the treasurer, in actions brought against him respecting the affairs of the Company, are protected by the 161st clause (a). *Corpe* is therefore without any remedy unless this mandamus be granted. This case is different from that of *The King v. St. Patrick's Assurance Company*. There the act constituting the Company contained a clause which made the effects of all the shareholders liable to executions in actions brought against the Company.

Second point.

As to the objection, that what would be a good plea to an action on the award is a good return to the mandamus—

Third point.

(a) The 161st section, after directing that all actions or suits instituted by the Company shall be prosecuted in the name of the treasurer, or any one of the directors of the Company for the time being, and that all actions instituted against the Company should be prosecuted against the treasurer, or some one of the directors of the said Company for the time being, proceeds thus: "Provided nevertheless that the body or goods,

chattels, lands, or tenements of such treasurer or director, shall not, by reason of his being defendant in such action or suit, be liable to be arrested, seized, detained, or taken in execution; and provided that all costs and expenses to be incurred by such treasurer or director in prosecuting or defending any action or suit for and on behalf of the said Company, shall be defrayed out of the moneys applicable to the purposes of this act."

1832.

The KING
v.ST. KATHA-
RINE DOCK
COMPANY.

If the award be made on a mistaken ground, the proper course is to apply to the Court to set it aside; *Johnson v. Durant* (a). No objection can be taken to the award, except from what appears upon the face of it. It does not appear in the award that there were any matters in difference between the parties, except the two actions mentioned. The averment in the return is, that the damages for the breach of the covenant was not included in the action brought by the Company, and that the award relates solely to the two actions. The damages might not be included in the declaration of the action brought by the Company, yet they might have been part of the subject-matter of the plea to the action brought against the Company. The Solicitor-General was here stopped by the Court.

Second point. DENMAN, C.J.—The first question in this case is, whether the writ of mandamus has properly issued? Where a party has any other legal remedy, the Court will not grant a mandamus. Here the prosecutor would not be able to obtain execution. The writ of execution must follow the judgment, and must therefore issue against the goods of the treasurer; but the statute protects the effects of the treasurer, and gives no power to take the chattels of the Company. The party is consequently without remedy, and a mandamus will therefore lie.

Third point. The next question is, whether the return to the mandamus is sufficient on the face of it. It is discretionary on the part of the Court, to proceed immediately to quash the return or to wait and receive affidavit to assist their judgment. The Court thinks the return is bad on the face of it. The return is drawn with considerable ingenuity: it avers that there was a matter in difference between the parties which was not included in the declaration in the action brought by the Company against *Corpe*, and that the

arbitrator omitted to make any adjudication respecting that claim, but it is not stated that this claim was not a matter of defence to the action brought against the Company. It should have appeared in the return, that this claim was not taken into consideration by the arbitrator. I am therefore of opinion that the return is insufficient.

1832.

 The KING
 v.
 ST. KATHARINE DOCK
 COMPANY.

PARKE, J.—I entertain the same opinion. The first question is, whether a mandamus should have originally issued. An objection to the issuing of the mandamus may be taken at this stage of the proceedings, but is regularly to be made when the mandamus is moved for. A mandamus will be granted where the party has no other specific remedy. There is in this case no other remedy. No execution could issue against the effects of the Company, as the writ of execution must pursue the form of the judgment, and the goods of the treasurer are protected. In *Wormwell v. Hailstone* (a), it is thrown out by the Court, that a mandamus in a case like the present is the proper remedy; and I know no other mode of obtaining payment out of the corporate funds. It therefore appears to me that a mandamus will lie, unless the return made be sufficient. The return is drawn with much skill, but it is defective in not stating that the claim made by the Company was not adjudicated upon in the action brought by *Corpe* against the *Saint Katharine Dock Company*. The return only states that the claim of the Company was not included in the declaration in the action brought by them against *Corpe*. This may have been so, and the arbitrator may have nevertheless taken this claim into his consideration in the action brought by *Corpe*.

TAUNTON, J. concurred.

PATTESON, J.—I think it clear that a mandamus may be granted. In *Wormwell v. Hailstone* the same arguments

(a) 6 Bingh. 676.

1832.

The KING
v.ST. KATHARINE DOCK
COMPANY.

were urged which have been pressed upon this occasion. As to the return it is bad, as it does not state that the arbitrator did not take this matter into his consideration. The return only specifically states that it was not included in the action brought by the Company against *Corpe*.

Peremptory mandamus awarded.

In re WILLIAM JONES, Esq. Marshal of the K. B. Prison.

Attorneys are entitled to be admitted to the interior of the K. B. prison, when they have occasion to go there for the benefit of clients confined in the prison, or when they are sent for by such clients. But the Court will not make a general order upon the Marshal to permit an attorney to go into the interior at all times to visit his clients.

A RULE was obtained by *Alexander*, calling upon the Marshal to shew cause why he should not permit Mr. *Matanle*, an attorney of this Court, at all times to go into the interior of the prison for the purpose of visiting his clients there; against which,

Campbell, S. G. now shewed cause. The Court possesses no jurisdiction over this matter. The rule of Trinity term, 21 Geo. 3 (a), gives a discretion to the Marshal to admit or refuse to admit whomsoever he shall think proper.

Alexander, in support of the rule. The rule cited by the Solicitor General does not give power to the Marshal absolutely to refuse admission to any person, but merely to regulate the hours of admission and time of stay according to his discretion; and in case of an introduction of spirits by any individual, then it gives the Marshal power for the future

(a) Which directs "that the Marshal of the Marshalsea of this Court shall permit no persons to enter into the prison without their being first searched, to see whether they have any spirituous liquors about them; and that he do not suffer the wives or children of any

of the prisoners to lodge in the prison, under any pretence whatsoever; and that the Marshal do prescribe in *what manner, and for how long, visitors shall be allowed to see or stay with the prisoners*, according to the circumstances of every case, in his discretion."

to refuse to admit him. The present application is founded, not upon the regulation referred to by the Solicitor General, but upon a former rule (a). The inconvenience that would follow from refusing to make this rule absolute would be very great, inasmuch as it would give to the Marshal power to refuse even to allow the applicant to visit his clients who are in need of his assistance. From the affidavits it is quite clear that the applicant has not been guilty of any such impropriety as would justify his exclusion. The discretion of the Marshal cannot be absolute, but is subject to the superintendence of this Court.

1832.
In re JONES.

DENMAN, C. J.—The rule of Trinity term, 21 Geo. 3, seems rather to apply to regulations respecting wives and families, and the introduction of spirituous liquors. The visitors spoken of can hardly mean the attorneys, who go thither for the benefit of their clients; but even in such a case we should certainly consider that the Marshal had power to exclude, upon good cause shewn to the Court. Here, it is not stated by Mr. *Matanle*, in his affidavit, that his presence was required by any of his clients, or that he made application to be admitted on the ground of being sent for by any client, or that his presence was at all necessary. The rule, we think, must therefore be discharged.

Rule discharged (b).

(a) "Michaelmas Term, 3 Geo. 2, (1729).

"That the turnkeys of the said prison do diligently attend at the gate or door of the said prison,

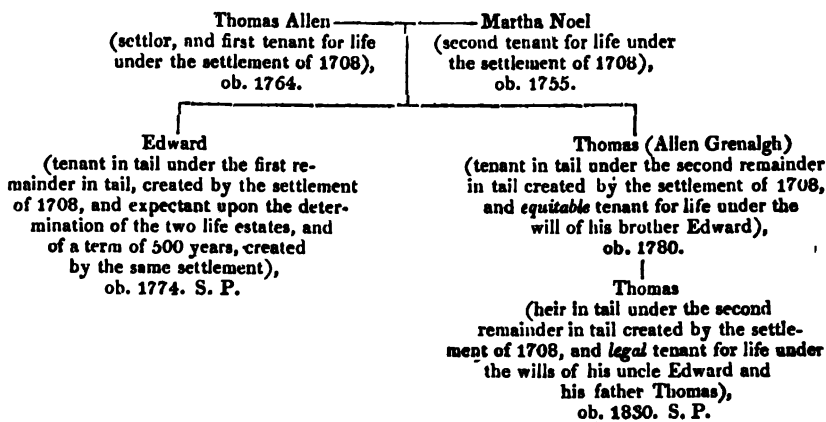
as the duty of their office requires, and do admit all such persons to have access to any of the prisoners as by law are entitled thereto."

(b) And see *ante*, 68, (c).

1832.

DOE, on the demise of COOPER, v. FINCH and others.

PEDIGREE.




Lands stand limited to *A.* for 500 years; remainder to *B.* in tail; remainder to *C.* in tail: reversion to *B.* in fee: *B.* levies a fine with proclamations to the use of himself in fee:—Held, that although the estate for years of *A.* continue, the estate of *B.* is discontinued [*quare*, barred], and the remainder in tail to *C.* divested.

B. dies without issue, having, after the fine, devised to *J. S.* for the life of *C.*; remainder to *D.* (the son of *C.*) for life: *C.* enters, suffers a recovery, and having survived *B.* five years, and having, after the recovery, devised to *D.* (his heir in tail) for life, dies: *D.* enters:—Conceded, that *C.* was not remitted, and that his recovery was void:—Held, that *D.* was not remitted. *Semble*, that the reversion in fee of *B.* was devisable, notwithstanding the discontinuance. *Sed quare*.

EJECTMENT for lands at Finchley, in the county of Middlesex. At the trial of the cause before Lord *Tenterden*, C.J., at the sittings at Westminster after Hilary Term, 1832, a verdict was found for the plaintiff, subject, as to such of the premises sought to be recovered as were comprised in the settlement hereinafter mentioned, to the opinion of the Court on the following case:

1708, 2d and 3d July.—By indentures of lease and of Settlement. release and settlement, *Thomas Allen* conveyed the manor of Finchley, and other hereditaments in Finchley, to *Noel* and *Rowney* and their heirs, to the use of the settlor and his heirs, until marriage between him and *Martha Noel*, and after the marriage to the use of the settlor for his life; remainder to the use of trustees during his life, to preserve contingent remainders; remainder to the use of *Martha* for her life; remainder to the use of other trustees for 500

years, upon trusts for raising portions for younger children; remainder to the use of the first and other sons of the marriage successively in tail male; remainder to the use of the heirs and assigns of the settlor.

1832.

 DOR
 v.
 FINCH.

Edward and *Thomas* were the only issue of the marriage, 1752.—*Thomas*, the brother of *Edward*, married *Ann Edwards*, and thereupon made a settlement of the portion provided for him, as youngest child, under the trusts of the term; but the term was not then, nor has it since been assigned. The defendants are precluded by an order of Court from setting up the term against the plaintiff's title.

1755, April.—*Martha* died.

1764, April.—The settlor died intestate, when his reversion in fee under the settlement of 1708 descended to his eldest son *Edward*.

1764, 10th July.—By indenture between *Edward* of the one part, and *Castleton* and *Kynaston* of the other part, *Edward* covenanted to levy a fine *sur cognizance de droit come ceo*, &c. to *Castleton* and *Kynaston* of the said manor and hereditaments, to the use of himself (*Edward*) in fee. In Trinity Term, 4 Geo. 3, a fine with proclamations was duly levied accordingly.

Fine by first tenant in tail under settlement.

1773, 6th November.—*Edward* made his will, duly attested, and devised his real estates to *Gould* and *Wynne* and their heirs, to the use of *Gould* and *Wynne* and their heirs during the life of, and in trust for, *Thomas* his brother; remainder to the use of *Thomas Allen*, the nephew of the testator and son of *Thomas* the brother, for his life; remainder to the use of *Gould* and *Wynne* and their heirs during his (the nephew's) life, to preserve contingent remainders; remainder to the use of the first and other sons of *Thomas* the nephew, successively in tail male; remainder to the use of his daughters in common in tail, with cross remainders in tail; remainder to the use of the Hon. *Thomas Noel*, if living at the failure of issue of *Thomas* the nephew, in fee; but if then dead, to the use of the Rev. Dr. *Edward Cooper* in fee.

His will, devising to trustees for the life of second tenant in tail under settlement; remainder to such tenant's only son for life; ultimate remainder to lessor of the plaintiff.

1832.

DOE
v.

FINCH.

Entry of second tenant in tail, and recovery suffered by him.

1774, February.—*Edward* died without issue, whereupon *Thomas* the brother entered.

1774, 15th and 16th April.—By indentures of lease and release, *Thomas* the brother conveyed the said manor and hereditaments to *Wilmot* in fee, as tenant to the *præcipe* in a common recovery to be suffered by *Thomas* the brother, and of which recovery the use was limited to himself in fee. In Easter Term, 4 *Geo.* 3, a common recovery was suffered accordingly.

His will, devising to his only son for life; ultimate remainder to defendants.

1774, 5th July.—*Thomas*, the brother, made his will, duly attested, and devised his real estates to *Thomas* the nephew, for his life, with remainders over (which remainders failed), with the ultimate remainder to the right heirs of Sir *Thomas Allen*, grandfather of the settlor.

Entry of son.

1780, April.—*Thomas* the brother, who had continued in the undisturbed enjoyment, died, whereupon *Thomas* the nephew, his only child, entered.

Entry of defendants.

1830, April.—*Thomas* the nephew, who had continued in the undisturbed enjoyment, died without having had any issue; whereupon the defendants entered, and have since continued in possession.

Thomas Noel (the devisee in fee named in the will of *Edward*) died in the lifetime of *Thomas*, the nephew.

1792, September.—*Edward Cooper* (the substitute devisee in fee named in the same will) died, leaving the lessor of the plaintiff his heir at law.

The defendants are the right heirs of Sir *Thomas Allen* (1).

(1) The points for argument were thus stated in the margin of the case:—"The counsel for the plaintiff will contend that the fine levied by *Edward Allen*, having discontinued [*vide infra*, 154, 166, n.(73), 178, n. (90)] the estate tail and displaced the remainder, *Thomas Allen Grenalg* could not, by the lease and release of 15th and 16th April, 1774, convey any freehold estate to *Wilmot*, so as to make a

good tenant to the *præcipe*; and that the recovery being therefore void, the lessor of the plaintiff is entitled under the will of *Edward Allen*."

"The counsel for the defendants will contend that the fine of Trinity Term, 4 *Geo.* 3, did not operate as a discontinuance; or, if it did so operate, yet that the reversion in fee, limited by the settlement of 1708 to the heirs of *Thomas Allen*

Follett, for the plaintiff. The case will turn upon the effect of the recovery suffered by *Thomas*, the brother. The only question is, whether he was in a situation to make a good tenant to the *præcipe*. Now, *Edward* being tenant in tail in possession, with reversion to himself in fee, levied a fine, the effect of which fine was to discontinue the estate tail of *Edward* (2), and to displace the remainders. [*Taunton*, J. That is so where there is tenant in tail, with remainder over to a third person—but is it so where the tenant in tail has the fee in himself? In that case, I have always understood the effect of a fine to be to extinguish the estate tail, and to bring the reversion into possession, and thereby to let in prior incumbrances by ancestors. Under the settlement, *Edward* took an estate tail, with an immediate reversion in fee to himself.] There was a *mesne* remainder in tail to *Thomas*, the brother. The effect of the fine was to divest that remainder. [*Parke*, J. It is quite clear that *Thomas*, the brother, had a remainder in tail.] So that here the question as to the reversion does not arise. *Edward* took a base fee (3) under the fine—it was that fee which he devised by his will; and he also had the reversion in fee (4). [*Patteson*, J. There was a recent case in the Exchequer, tried before me at Monmouth, in which the effect of a fine levied by a tenant in tail was very much considered (5). That was the case of a tenant in tail in remainder.] When the principal case was tried at *Nisi Prius* before Lord *Tenterden*, the point suggested by Sir *James Scarlett* was, that the doctrine of remitter would apply; and that was understood to be the only point in dispute between the parties here. [*Parke*, J. No estate of freehold is given by the will of *Edward* to *Thomas*, the brother.] At the death of *Edward*, when *Thomas*, the brother, entered, the

1832.

DOE
v.
FINCH.

Base fee.

the settlor, did not, in the events stated in the case, vest in Dr. *Edward Cooper* under the will of *Edward Allen*."

(2) *Vide* *infra*, 167, 178, n.

(3) *Vide* *infra*, 167, 170.

(4) *Vide* *infra*, 139, note (19).

(5) The case here referred to by the learned judge is, no doubt, that of *Doe* d. *Thomas* v. *Jones*, 1 *Crompt. & Jerv.* 528; *infra*, 179, note (90).

1832.

DOE

v.

FINCH.

estate of freehold was in *Gould* and *Wynne*, and there was merely an equitable estate for life in *Thomas*, the brother, who, having entered, suffered a recovery. [*Parke*, J. If he had taken a legal estate of freehold it would have been quite a different case.] But the point is, he had no freehold at all. The whole doctrine is contained in *Co. Litt.* under the title "Discontinuance" (6). [*Denman*, C. J. Enough has been said to make it reasonable to ask the other side in what way they mean to put their case.]

First point—
No discontinuance.

Second point
—Remitter.

Whether a
right of action
under a reversion
discontinued is devisable.

W. Hayes, for the defendants, stated that he meant to contend, first, that, by reason of the subsisting tenancy under the term of 500 years, the fine was not a discontinuance; and, secondly, that *Thomas*, the nephew, was remitted. [*Parke*, J. The term is removed out of the case. It is not to be set up at all. It is only not to be set up in bar of the ejectment. But we may use the term for the purpose of shewing what was the state of the title when the fine was levied. [*Follett*, for the plaintiff, conceded this point.] As the plaintiff's case was originally shaped, he founded his title on the reversion in fee of the settlor, contending that the reversion passed by the will of *Edward*, and was not barred by the recovery. But if the reversion was discontinued, it was no longer devisable; consequently it did not pass by the will of *Edward*, and so far as the plaintiff builds upon that, he has no title whatever. [*Taunton*, J. Is not an interest recoverable in formedon devisable? Do you mean to contend that an interest, because it is not recoverable in ejectment, but only recoverable by formedon, is, therefore, not devisable? That is the consequence of your argument.] That even a right of entry is not devisable, is pretty clear; *à fortiori* a right of action is not devisable (7).

First point—
Discontinuance.

Follett for the plaintiff. If it can be maintained, that, because, under the original settlement, there was a trust

(6) Sect. 592.

(7) *Vide infra*, 171, note (85).

term to raise portions for younger children, the fine of *Edward* had no operation, then, no fine levied by tenant in tail can ever operate, since there are generally terms in old family estates for the purpose of raising portions for younger children. It has never been contended that where a term is outstanding the tenant in tail could not levy a fine, so as to discontinue the estate tail. It is true the fine may not affect the term—the term may still continue; and, even if the term were destroyed by the fine, there would be no question that the party might have the term kept on foot (8). As between the termor and the tenant in tail, there might be a question in regard to the term, but there could be no question as to the divesting or displacing of the remainder. It appears perfectly clear, upon the authorities, that a fine levied by a tenant in tail, where there is any estate of freehold outstanding, does not operate so as to work a discontinuance of the estate tail, but that a term of years outstanding is a nullity, so far as regards the operation of the fine upon the estate tail and the remainders (9). It appears from *Litt.* (10), that if tenant in tail of a reversion, remainder, rent, common, or other thing which lies in grant, levy a fine of it in the King's Court, it does not make a discontinuance; for nothing passes but for his own life. So, if the reversion be after a lease for his own life. But if it be after a lease by him (11) for years, it will be a discontinuance; for then the freehold passed by the fine, and all the estates are displaced (12). *Edward* was tenant in possession of the freehold at the time he levied the fine; which fine, therefore, displaced the remainder. In *Co. Litt.* (13), it is said, "If a tenant in tail make a lease for

1832.

Don
v.
Fitch.

(8) *Quere*, whether at law or merely in equity?

(9) *Com. Dig.* Discontinuance, C. 3.

(10) *Sect.* §18.

(11) *Notes* (47) and (92), *infra*.

(12) *Co. Litt.* 332*b*; *infra*, 178, n.

(13) 332, *b*. Lord Coke refers in the margin to two authorities.

The first is an original case of T. 15 *Edw.* 4, in Fitzherbert's Abridgment, title "Discontinuance," pl. 30, of which the following is a literal translation. "Note, by Littleton, if tenant in tail lease the land for term of years, and then grant the reversion in fee by fine, that this is not a discontinuance,

Fitz. Abr. T. 15 E. 4, Discontinuance, pl. 30.

1832.

DOR

v.

FINCH.

years of lands, and after levy a fine, this is a discontinuance, for a fine is a feoffment of record, and the freehold passeth.

because he had that reversion in tail (a). But if tenant in tail lease for term of life, and then grant the reversion, and the tenant for term of life attorns and dies in the life of the tenant in tail, this is clearly a discontinuance. But if tenant in tail lease for term of life, and then die, and the heir grants the reversion, and the tenant attorns and dies, living the issue in tail, this is no discontinuance, because he was never seised by force of the entail. And if the father disseise the grandfather tenant in tail, and make feoffment without warranty, and the grandfather dies, the father cannot enter contrary to his feoffment, but the son may well enter, because it is no discontinuance, for he was never seised in tail. And if tenant in tail lease for term of life, and then grants the reversion, and the tenant attorns, and the grantee grants this reversion over, and the tenant attorns and dies in the life of the second grantee, this is no discontinuance. And if the husband lease the land of his wife for term of life and die, and the reversion descends to his issue, who grants this reversion to another in fee, and the tenant for term of life attorns and dies in the life of the grantor, this is no discontinuance, but the wife or her issue may enter well enough; for the issue had nothing in the right of his mother, the wife of his father, and therefore this grant cannot make dis-

continuance. And *Town.* said that if tenant in tail lease for term of life and dies, now the issue has the reversion in fee, but this is only for the time, *scil.* for term of life, but he has always the right of the entail, and consequently he may discontinue. And if the baron and his feme be disseised, and the disseisor die, and his heir being in by descent, enfeoffs the baron, who makes feoffment, and then the baron dies, the feme may well enter; for the descent shall not prejudice her, because it was during the coverture; and the feoffment of the baron shall not prejudice her, because he was not seised in the right of his feme at the time, &c."

The other authority vouched by Lord Coke is referred to in the modern editions of Co. Litt. as "6 H. 56, 57," a reference not very intelligible, but the case has been discovered in M. 6 E. 3, fo. 56, 57. It was an action of *quare impedit* by *John* (of Eltham), Earl of Cornwall (b), against the Bishop of *Rochester*, for the presentation to the church of *Mixbie*. The declaration stated, that *Hen. 3.* being seised of the honour of *St. Walry*, to which the advowson is appendant, presented to the church, and afterwards gave the honour and advowson to *Richard*, Earl of Cornwall and King of Germany (c), habendum to him and the heirs of his body; that the honour and advowson descended from Earl *Richard* to Earl *Edmund* (d), who present-

Earl of Cornwall
v. Bishop
of Rochester. (1332.)

(a) *i. e.* because the estate for years was carved out of, and parcel of, the estate tail.

(b) As to this prince, see 3 Mann. & Ryl. 155, 179, 350.

(c) As to whom, see 3 Mann. & Ryl. 141, 145, 334, 337, 340, 459.

(d) 3 Mann. & Ryl. 141, 142, 314, 334, 337, 340, 348, 360, 363, 365.

But if tenant in tail maketh a lease for his own life, and after levy a fine, this is no discontinuance, because the reversion

1832.

 Doe
 v.
 Finch.

ed the last incumbent; that upon Earl *Edmund's* dying without heir (of his body), the honour and advowson descended to *Edw. 1.* and then to *Edw. 2.* and to *Edw. 3.* who gave the same to the plaintiff and the heirs of his body. Plea, that in H. T. 8 *Edw. 1.* by a fine levied between the then Bishop of *Rochester* and Earl *Edmund*, the Bishop granted and released all his right in the advowson of St. Brian to the Earl in fee, for which grant and concord the Earl granted certain land, and the advowson of the church of *Mixbie*, &c. to the Bishop and the church of St. Andrew of *Rochester*, in fee; that Earl *Edmund* died seised of the advowson of St. Brian, and of other tenements, without heir of his body, whereby King *Edw. 1.* entered as cousin and heir, from whom it descended to the now King; and therefore it belongs to the Bishop to present; and that if the King himself had sued, he might have been foreclosed by the deed of his ancestor containing warranty.

Scott, for the plaintiff.—Inasmuch as the advowson is appendant to the honour of St. Walry, and the consor of the fine had only an estate tail, and the Bishop and none of his predecessors have had possession of the advowson by presentation, the advowson still continues appendant to the manor.

Parning, for the defendant.—Although Earl *Edmund* had but fee tail, the advowson was by the fine severed from the honour, and the King would have been foreclosed by the warranty of his ancestor, with assets by descent.

Schard.—There is no writ of formedon for an advowson, for tenant in tail cannot discontinue the entail of an advowson as he can of tenements which pass by livery of seisin; for although he gives the advowson, &c. yet if afterwards the donor be in, as in his reversion, and the church becomes void, he shall have the presentation, notwithstanding the gift by tenant in tail, namely, where he to whom the gift is so made by tenant in tail has never presented.

Parning.—You say ill; for if after Earl *Edmund* had granted the advowson, a man had wished to demand the advowson, he must have brought his writ against the Bishop; which shews that Earl *Edmund* was then out of possession; and nothing could revert but that of which Earl *Edmund* was possessed at the time of his death.

TREW, J.—The Bishop cannot here avail himself of the exchanges, which only hold where there has been transmutation of possession from one to the other; but in this case, by the deed of the Bishop, nothing passed to the Earl, the deed being merely a release of the right of the advowson of St. Brian, which advowson the Earl had before.

Parning.—Although it is said that the advowson was appendant to the honour, yet as Earl *Edmund* gave an acre of land with the advowson by fine to the Bishop, he severed the advowson from the honour, and made it appendant to the acre of land; wherefore the advowson did not revert to the King by reason of the warranty and assets; and as the King might

1832.

DOR
v.
FINCH.

expectant on an estate of freehold, which lyeth in grant, passeth thereby." The effect of a fine by tenant in tail upon an outstanding term, has been frequently considered by the Courts, but it was probably never before suggested that the term prevented the fine from operating as a discontinuance. All the law upon this subject is collected in the cases referred to by Cruise (14), who, after observing that "terms for years may be barred by a fine and non-claim, if the lessees were or ever might have been in possession," cites *Taffyn's case* (15), in which, he says, "It was resolved, that although a lessee for years had not himself such an estate as would enable him to levy a fine, yet it did not therefore follow that his interest should not be barred by a

4 *Hen. 7, c. 24.* fine; that a term for years was within the statute 4 *Hen. 7*, being comprehended under the word *interest*; and as the object of that act was to prevent strifes and debates, it would not have that effect, if its operation did not extend to long terms of years, which are now so common. This principle (he adds) was carried so far, that where a person who had a long term for years, assigned it over to a trustee

have been foreclosed, the Earl claiming by gift from the King shall be foreclosed also.

TREW, J.—You do not deny that the advowson was appendant to the honour, which honour is in the hands of the King by the death of Earl *Edmund* without heirs of his body, and as it cannot be said that the advowson was vested in the Bishop by presentment, the estate tail was not discontinued. Wherefore, &c.

It was afterwards insisted, that although the estate tail might not be discontinued, yet the King was barred by the warranty and assets. A difficulty arose as to the power of the Court, without the express permission of the King, to try the question whether assets had descended to him or not. The Earl

was ultimately non-prossed.

Neither of these cases appear to support the proposition advanced by Lord Coke in the passage referred to in 1 *Inst.* 332 *b*, which indeed seems to be at variance with the cases cited below (180, note (92).) Many of the marginal references in *Co. Litt.* appear to have been inserted for the purpose of directing the student in his inquiries, rather than as authorities for the positions laid down in the text.

(14) 5 *Cruise's Dig.* 163. Many of the inaccuracies of this author have been corrected by his editor; but this *Digest* is still a work of which the design is more commendable than the execution.

(15) 5 *Co. Rep.* 123; *Cro. Jac.* 60.

in trust for himself, then purchased the freehold and inheritance of the lands, and levied a fine, it was resolved that the term was barred, the assignee of it having suffered five years to pass without making any claim (16). Mr. Justice *Ventris* takes notice of this case, and observes "that the conusee of the fine, who was also the purchaser of the freehold, did not know of the term, or that it was held in trust for him, so that if the fine had not barred it, he would have been cheated. But that where a term is assigned in trust for a person who is seised of the inheritance, and who is in possession, a fine levied by him will not destroy the term, because the owner of the inheritance is in cases of that kind tenant at will to his trustee; and this rule has ever since been adhered to, so that it is now a settled principle that terms for years, which are kept on foot by purchasers for the purpose of protecting the inheritance, are not barred by a fine, otherwise fines would frequently weaken the interest of purchasers, instead of adding to their security." The question between the termor and the person levying the fine, is a question between them exclusively; *Reynolds v. Jones* (17). Cruise goes on to say (18), "A term which is vested in trustees, on any particular trust, (except that of protecting the inheritance,) may also be barred by a fine and nonclaim." So that it became a question whether the term is barred; but it never was a question whether a tenant in tail, having the first estate of freehold, is competent to levy a fine, which shall have the usual effect of a fine levied by a tenant in tail in possession. That point has always been treated as settled law.

II. The plaintiff does not found his title solely upon the reversion in fee (19); for the effect of the fine levied by *Edward* is to create a new estate—an estate in fee—which (the fine having discontinued the estate tail (20) and displaced the remainder) is not subject to be defeated, except by formedon

1832.


 DOR
v.
FINCH.

(16) *Ischam v. Morrice*, Cro. Car. 109.

(17) 2 Sim. & Stu. 306.

(18) 5 Cruise, 164.

(19) *Vide supra*, 133, note (5).

(20) *Infra*, 154, 166, n., 178, n.

Second point
—New fee.

1832.

DOE
v.
FINCH.

brought by the remainder-man. [*Taunton*, J. Did not the fee cease with the estate tail?] A new estate in fee was created by the fine. None could bring formedon during the existence of issue in tail; but where the estate tail is discontinued, the remainder-man may bring formedon, on the failure of issue in tail; and until he recovers in a real action, the estate in fee subsists. The case is similar to that of a disseisin under the old law, by which the party acquired a new fee simple descendible to his heirs. [*Taunton*, J. That is, an estate defeasible by formedon only.] The effect is, to give to the tenant in tail levying the fine, the right of possession, though the right of property may be in another. The remainder-man has no right of entry; if he enter, he may be turned out. *Thomas*, the brother, was entitled to bring a real action upon the death of *Edward*. If he had brought his formedon against *Gould* and *Wynne*, and recovered judgment, then he might have made a good tenant to the præcipe; but as he allowed five years to pass without bringing his formedon, the estate which *Edward* acquired by the fine became a fee simple indefeasible (21). *Doe d. Odiarne v. Whitehead* (22) is a

Fine and non-
claim—leading
principles.

(21) In considering the effect of a fine with proclamations as a bar by nonclaim, the leading principles to be kept in view appear to be these: 1. The estates to be barred must be divested or discontinued (*i. e.* put to *rights*, of entry or of action) before the levying of the fine, or by its operation. (9 Co. Rep. 106 *a.*) 2. The state of the title, as determined by matter precedent to the levying of the fine, is to be regarded; for if the inheritance be then limited for a particular estate, with remainders, each successive taker by purchase will have a new period of claim from the accruer of his right of entry or of action. (Co. Litt.

372.) 3. The condition of the rightful owner with respect to freedom from disability, at the time of the fine levied, in the case of a right then accrued, otherwise, at the time when the right accrues, is to be regarded. 4. Changes in the state of the rightful title, by matter subsequent to the levying of the fine, are not to be regarded; for if the person whose right is proposed to be barred were competent to create interests, giving new periods of claim, the bar might be postponed for an indefinite period. This proposition, however, supposes that a right of entry or of action is *alienable*; but it is conceived that such

leading case upon this point. *Edward* having gained a fee, defeasible if the remainder-man brought his formedon in

1832.

Doe

v.

FINCH.

a right cannot be transferred either by deed or by will; (*vide infra*, 171, n. (85);) and if so, no change in the rightful title subsequent to the fine would be possible until the restoration of the divested or discontinued estate. 5. If the time once begins to run against the owner of the right to a given estate, it will run on, notwithstanding subsequent disabilities, &c. till that estate is barred, unless stopped by entry or action on the part of the claimant. *Doe d. Duroure v. Jones*, 4 T. R. 300; *Doe d. George v. Jesson*, 6 East, 80, and 2 Smith, 236; *Roe d. Langdon v. Rowston*, 2 Taunt. 441; *Cotterell v. Dutton*, 4 Taunt. 826; *Doe d. Griggs v. Shaen*, 1 Selw. N. P. 147, n. 5. Issue in tail, claiming by descent, are not, like remaindermen, claiming by purchase, allowed, as against a fine, (*Doe v. Pyke*, *post.*) successive periods of claim; (3 Co. Rep. 87 b; Plowd. 357;) but if the time runs against a person presently entitled to an estate tail, the issue, as well lineal as collateral, inheritable under the entail, will be barred by the fine, or, if it begins to run against such person, it will run on, notwithstanding his death, leaving issue in tail under disability.—The first, second, and fourth points are illustrated by the case of *Goodright v. Forrester*, 1 Taunt. 578. There *A.*, tenant for life in possession, remainder to his own executors for forty years, remainder to *B.* in fee, levied a fine with proclamations; then *B.* (his remainder

having been turned to a right of entry by the fine) devised to *C.* for life, remainder to *D.* in tail. *B.* died, and afterwards *A.* died. *C.* did not enter on the death of *A.*, or within five years after the expiration of the forty years. The judges were all of opinion that the right of entry was confined to five years after the expiration of the term of forty years, and that *B.* could not by his will give a right to avoid the fine at a more distant period. As, on the one hand, the right to avoid the fine cannot be protracted by any change in the subsequent title, so, on the other hand, the bar to expectant interests, under the pre-existing title, cannot be accelerated, but must await the regular accession of the several claimants. It will be observed that in *Goodright v. Forrester*, the term was posterior to the estate of the conusor, and was divested by the fine; whereas, in the principal case, the term was anterior to the estate of the conusor, and (it should seem) not divested, although the remainder was held to be divested. The effect of divesting, without discontinuing the remainder, is to turn it into a right of entry; the effect of discontinuance is to take away the right of entry, and to substitute a right of action. *Goodright v. Forrester* decides that, notwithstanding the disturbance of the term, the right of entry subsisted for five years from the effluxion of the term: so, in the principal case, where the term was not displaced,

Distinction between divesting and discontinuance; *et vide infra*, 176, n.

1832.

Doe

v.

FINCH.

Presumption
of a recovery
in formedon.

proper time, which he did not, devised the estate to *Gould* and *Wynne*, in trust for *Thomas*, the brother, for life, with remainders over, which failed, with the ultimate remainder in fee to Dr. *Edward Cooper*, who therefore became entitled to the fee created by the fine, and whose heir entered on the determination of the particular estates limited by the will of *Edward*. [*Denman*, C. J. It is not found that he entered.] He brings his ejectment. The entry is admitted. It was not necessary to make an actual entry.—There is no answer to the action. This case has already been litigated in this Court, as well as in the Court of Chancery, and the argument founded on the term is not resorted to until the last stage. Another point set up was, that a formedon might be presumed to have been brought; but that was abandoned at *Nisi Prius*. No Court could presume a recovery in a real action, merely because it is not a case to which the doctrine of remitter applies. Unless the whole doctrine applicable to fines is to be overturned, the plaintiff is entitled to recover.

First point—
No discontinuance.

Second point
—Remitter.

W. Hayes, for the defendants. No attempt will be made to contend that *Thomas*, the brother, was remitted. That point is too clear for argument (23). But two new points will be made. FIRST, the fine of *Edward* did not work a discontinuance, but merely barred his issue in tail under the statute (24), and passed a fee determinable on the failure of such issue. On the death of *Edward*, without issue, whereupon *Thomas*, the brother, entered, the title conferred by the fine was at an end. Or, SECONDLY, if the fine worked a discontinuance, then it turned, not only the remainder in

it may be contended that the right of action would, *a fortiori*, subsist for five years from the effluxion of the term; and that therefore it was not extinct at the end of five years from the death of *Edward* without issue, but a continuing right in *Thomas* the brother,

which descended to *Thomas* the nephew.

(23) *Bishoppe v. Bishoppe*, Dyer, 221, a. "This was afterwards affirmed by Catlyn, Saunders, C.B., Browne, and Whiddon, at dinner, (*ad prandium*)."

(24) 4 Hen. 7, c. 24.

tail of *Thomas*, the brother, but the reversion in fee of *Edward*, to rights of action; the right of *Edward* to the reversion was descendible, but not devisable; it descended to the right heirs of the settlor; and although *Thomas*, the brother, was not remitted, yet *Thomas*, the nephew, who entered on the death of *Thomas*, the brother, and had in him as well the *right* to an estate tail under the settlement, as a legal *estate* for life under the will of *Edward*, was remitted, and his remitter defeated the fee founded on the discontinuance, and consequently destroyed the title of the lessor o the plaintiff.

1839.

Dox
v.
Finch.

I. In order to determine the effect of the fine, we must advert to the state of the title at the time when it was levied. By the settlement of 1708, a term of 500 years was limited to trustees. This term was a legal estate anterior to the estate tail of *Edward*. It will not be denied that the term was subsisting at the time of levying the fine; indeed, up to the period when this ejectment was brought. It is conceded that, notwithstanding the order referred to in the special case, the term may be resorted to for the purpose of shewing what was the operation of a fine in 1764. To preclude the defendants from founding any argument upon the term would be to convert such orders, which are designed to promote the ends of justice, by removing a technical impediment to the fair trial of the right, into instruments of injustice. In order to appreciate the influence of this term on the question, we must attain a clear notion, first, of discontinuance—its nature, effect, and requisites—and, secondly, of the principles of tenure applicable to consecutive legal limitations connected in privity of estate.

1. As to the nature of discontinuance—it is, according to all the authorities, a wrongful act (25), an interruption or

Nature of discontinuance.

(25) Tenant in tail cannot make any rightful estate of freehold, but for the term of his own life only. Litt. s. 613. By the feoffment of tenant in tail the reversion is discontinued, which is a wrong. If

the issue bring formedon, the writ and declaration shall say that the feoffee by wrong him deforceth. *Ib.* s. 614. Every discontinuance worketh a wrong. Co. Litt. 332 a. And see Co. Litt. 347 b. 356 b.

Tortious character of estate acquired by discontinuance.

1832.

DOE
v.

FINCH.

suspension of the lawful seisin of those in remainder and reversion, whose estates are thereby forcibly and injuriously displaced, and turned to rights of *action* (as distinguished from rights of *entry*); so that they cannot enter, but must seek their remedy in a real action, (viz. a *formedon*). Its effect, as the books most expressly affirm, is to pass, not a base or determinable fee, but the fee simple (26). The invariable, the necessary result of discontinuance is, therefore, the tortious acquisition of the fee simple. A fee gained by wrong, whether by simple disseisin, discontinuance, or other unlawful means, must of course be a *new* fee (27), founded upon a new seisin, and involving a total repudiation of the *old* title;—an entire reconstruction of the inheritance upon a fresh basis. As no man can qualify his own wrong, if he wish to gain a title by wrong, he must claim the fee, the whole fee, and nothing but the fee. With respect to the requisites of discontinuance—the uniform language of the text-writers and adjudications is, that the fine or feoffment of tenant in tail does not work a discontinuance, unless he is seised *in possession* by force of the entail (28). The nature and effect of discontinuance, as already explained, indicate the necessity of possession; for every tortious alienation supposes and requires a transfer of the immediate and actual possession. It is clear that a tenant in tail in remainder cannot alien so as to make a discontinuance; nor will his possession avail, unless it be a possession in lawful and regular course under the entail; for if he obtain the possession by dis-seising a prior tenant for life (29), his fine or feoffment will

(26) By the feoffment of tenant in tail, fee simple passeth by force of the livery of seisin. Litt. s. 599.

(27) Co. Litt. 348 a, 349 a.

Possession of
discontinuor.

(28) None shall make a discontinuance, but he who is seised of an estate tail in possession. *Per Abbott, C. J.* in *Doe d. Jones v. Jones*, 2 Dowl. & Ry. 380; 1 Barn. & Cresw. 238.

A., tenant in tail; reversion to *B.* in fee; *A.* and *B.* make a feoffment: Held a discontinuance, "because of the livery of the tenant in tail, who hath the sole power of the immediate freehold, and the *immediate possession* and inheritance." *Baker v. Hacking*, Cro. Car. 387 and 405.

(29) Co. Litt. 333 b.

be of no force as a discontinuance; nor will his feoffment, made with the assent of a prior tenant for life, produce that effect (30). Again: it is laid down that of things lying in grant there can be no discontinuance (31); and the position is not confined to subjects incorporeal in their own nature, as rents, advowsons, commons, tithes, but is expressly extended to estates and interests not having a tangible existence, as remainders and reversions in subjects corporeal in their own nature, as land (32)—in short, to all estates and interests in land, to the conveyance of which no livery of seisin is requisite or possible, whatever may be the mode or form of conveyance, whether it be by an ordinary deed, or by fine levied in the King's Court (33). Now, to apply these doctrines. The possession, the immediate and actual possession, resided in the termors—the legal dominion for the whole period of the term of 500 years belonged to them; and so far as the present right, in point of law, to the possession and enjoyment of the land was concerned, the limitations ulterior to the term, conferred, during its subsistence, mere equitable interests. Till the term was expired, the tenant in tail could not lawfully enter. The question in *this* Court must be the same as if there had been a *beneficial* lease for 500 years. Then, why should *Thomas*, the brother, concern himself about the estate till his right

1832.

DOE
v.
FINCH.

(30) Com. Dig. Discont. C. 3.

(31) If a remainder be granted by tenant in tail, it is no discontinuance. Co. Litt. 332 a. And albeit such things (i. e. things lying in grant) be granted in fee by fine levied in the King's Court, yet this worketh no discontinuance. Litt. s. 618. If tenant in tail in remainder, or such a person as could not make a discontinuance by feoffment, release to a dis- seisor with warranty, it is no dis-

continuance. Com. Dig. Discontin. C. 1.

(32) The conveyance, though by fine, of that which lies in grant, works no discontinuance, because it works no wrong. Co. Litt. 332 a. "Where the thing doth lie in livery, as lands and tenements, yet if to the conveyance of the freehold or inheritance, no livery of seisin be requisite, it worketh no discontinuance." Co. Litt. 332 b.

(33) Notes (31) and (32), *supra*.

1832.

Dox

v.

FINCH.

of enjoyment accrued? Why bring *formedon* to restore himself to nothing—to an expectancy, for which his issue might await the efflux of centuries? The commencement of his possession was postponed to the determination of the term; it was, therefore, a future, and not an immediate, possession to which he was entitled. He was tenant in tail *in remainder* (34), so far as regarded his capacity to transfer the possession—to make livery—to act upon the inheritance in derogation of the rights of others. If *Edward* was really tenant in tail in possession, then he was competent to pass the fee simple by feoffment. But it is clear that his feoffment, made without the assent of the termors, would have been void; unless, indeed, it had operated to divest the term. It is essential to the validity of a feoffment that livery should be made of the *possession*; it is not enough that the feoffor has the freehold and inheritance (35). *Edward* could not acquire that possession without dispossessing the termors. It is said, indeed, that if tenant in tail leases for years, and then makes a feoffment with livery, to which the tenant for years assents, this is a discontinuance (36); but our case differs in two points—here the term is not derived out of, but existed anterior to, the estate tail; and the termors do not assent. Their assent (admitting such assent to be sufficient for the purpose in question), does not appear, and is not to be presumed (37). *Edward's* feoffment, therefore, could not have been supported on that ground, much less on the ground of its operating adversely to the termors. The termors, in execution of their trust, might have aliened or mortgaged, and it would not be endured that the feoffment should operate prejudicially to such dispositions (38). The position that the term would not have been disturbed by the feoffment is fully sustained by a recent decision of

(34) *Vide infra*, 150, note (49).


(35) Albeit the feoffor hath the freehold and inheritance, yet that is not sufficient; for a livery must be given of the *possession* also: Co. Litt. 48 b.

(36) *Viner*, Ab. Discontinuancé, B. pl. 25.

(37) *Vide infra*, 147, note (39).

(38) *Freeman v. Barnes*, 1 Vent. 55.

this Court, negating the idea of the possession being in *Edward*, and plainly affirming the possession, the actual possession, to be in the termors (39). [*Taunton, J.* There the Court held that the feoffment did not destroy the term, because it was not made with the assent of the termors: it was not to operate against them when they knew nothing of it; but if the feoffment, instead of being made behind their backs, by the *cetteux que trust*, had been made by the trustees themselves, the decision of the Court would have been very different.] Unquestionably; but that is not our case. Here is a prior term of years, which conferred a right to the possession; a term created by the owner paramount, part of the original title—of that very inheritance of which the estate tail was part—and not divested by the fine. In arguing *Doe v. Lynes*, Mr. *Preston* admitted (an admission against himself), that if the term continued, the possession of the termors was the possession or seisin of the reversioner, whose seisin, therefore, would not be disturbed. [*Taunton, J.* The rule undoubtedly is, that no person can create a discontinuance who is not in the actual possession of the *estate tail* (40) by force of the intail. Is there any case

1832.

 DOE
 v.
 FINCH.

(39) *T. C.* assigned a long term to trustees, upon trusts for himself, his intended wife, and their issue. By feoffment dated the next day, *T. C.* conveyed to the use of himself for life, &c reversion to his heirs. This reversion fell in. The heir brings ejectment against the trustees. Judgment for the defendant, on the ground that the feoffment did not acquire the legal fee by disseisin. *Preston*, for the plaintiff, admitted that if the term continued, the possession of the termor for years was the possession or seisin of the reversioner, whose seisin, therefore, would not be disturbed. *Abbott, C. J.* The foundation of the argument fails, because there is nothing to shew

that the trustees assented to the destruction of the term. *Bayley, J.* A court of law ought to set its face against deeds intended to work fraud and wrong. The trustees were entitled to the actual possession, and we must presume that they had it. *Holroyd, J.* To make the feoffment effectual the tenant ought to have been ousted, or his consent gained. *Doe d. Maddock v. Lynes*, 3 Barn. & C. 388; 5 Dowl. & R. 161. Tenant for life levied fine and devised; devisee entered. Held no disseisin, because no intention to claim adversely to party entitled. *Williams, lessee of Hughes, v. Thomas*, 12 East, 141.

(40) *Vide infra*, 168; *ibid.* note 80.

1832.

DOE
v.
FINCH.

which goes to shew that no discontinuance can be created unless the party be in the actual possession of the *land*?] He must be capable of delivering seisin—of making a feoffment. The termors were in possession, and are admitted to have been entitled to the possession up to the hour at which this ejectment was brought. They might have maintained ejectment. [*Patteson, J.* I do not find it stated that the termors were in possession.] In *Doe v. Lynes* the Court held that the termors were in point of law “in the actual possession.” [*Taunton, J.* What is there to shew he was not in possession by force of the intail?] The prior term conferred the right to the immediate possession. If *A.* has that right, it cannot at the same time reside in *B.* [*Taunton, J.* The question is, not whether *Edward* was in possession of the land, but whether he was in possession of the estate tail. Couple the words “in possession” with the word “estate,” and then argue upon that.] The expression “in possession of an estate tail,” must import the ownership of such an estate tail as confers a right to the immediate possession. *Edward* had not *such* an estate tail at the time of the fine levied. There may be consecutive rights to the possession; the first particular tenant has the immediate right to the possession, and the next taker has a right to succeed to the possession when the right of the particular tenant is determined, and not before; and that constitutes the whole difference between an estate in possession and an estate in remainder or reversion. If *Edward's* feoffment would not have passed the fee simple in possession (without which there can be no discontinuance), was his fine more efficacious? (41) Does the discontinuing operation of a feoffment require one species of possession, and the discontinuing operation of a fine another? When it is laid down that none but tenant in tail in possession can discontinue, has not *possession* one and the same

(41) No conveyance by tenant in tail can operate as a discontinuance unless it is created by livery,

or by that which, in the eye of the law, is tantamount to it. *Butler, Co. Litt. 333 a, n. 1.*

meaning in regard to every kind of assurance by which a discontinuance may be occasioned? Most of the instances put by *Littleton* in his chapter of discontinuance turn upon the operation of a feoffment (42); in all, the capacity of passing the immediate freehold by transmutation of possession, the state or condition of being able to make livery, is assumed as the ground-work of discontinuance. Discontinuance is a species of *disseisin*; it is clear that *Edward's* feoffment would not have worked a disseisin; by parity of reasoning his fine was not a discontinuance (43). If *Edward's* estate tail did not lie in livery, it lay in grant; it was a thing of which not only was no livery requisite, but of which, without the assent or ouster of the termors, no livery was possible. He might have conveyed the freehold by way of grant. [*Taunton*, J. What do you mean by a grant?—An assurance by deed adapted to pass an estate of freehold not in possession. [*Taunton*, J. Was not the first estate of freehold in *Edward*?—Unquestionably. [*Taunton*, J. Would that have passed by a common grant?—It will not be disputed that his estate would have passed by grant; that is, by deed, without livery, or any equivalent ceremony, and which, if the term had not existed, would have been inoperative at law. An estate tail expectant on a term of years is confessedly grantable (44). It matters not whether the term be created by a common law demise, perfected by the entry of the lessee, or by the limitation of a use, executed into possession by the statute of uses (45). In either case, the possession is in the termor, and, because the possession

1832.

DOE
v.
FINCH.

(42) S. 595, 596, 597, 599, &c.

(43) "Discontinuance of possession is an impediment to a man for entering into his own land, caused by the fact of one that alienated them contrary to right, and gave livery of seisin of them, whereby the true owner is left only to his action." Cowell's Interp. verbo Discontinuance. And see Finch's Common Law, tit. Dis-

cont. "Disseisin signifieth an unlawful dispossessing of a man of his land, tenement, or other immovable or incorporeal right." Cow. Interp. verbo Disseisin.

(44) Litt. s. 608.

(45) Vide *Chatfield v. Parker*, 2 Mann. & Ryl. 542, (a); *Doe v. Maisey*, 3 Mann. & R. 110, (a); *Green v. Miller*, 2 Crompton & Jervis, 142, 6 Mann. & Ryl. S. C.

1832.

DOE

v.

FINCH.

Particular
estates and
reversion form
one inheri-
tance.

is in him, the remainder or reversion will pass by grant. In practice, conveyances, ineffectual, from some omission, to pass the fee in possession (as a feoffment without livery, &c.), are often supported as grants of the fee in reversion expectant on a mortgage term or an attendant term. If *Edward* had granted by deed, without more, an estate of freehold would have passed (46). His competency to make a grant, by reason of the possession of the termors, is conclusive against his competency to make a discontinuance grounded on his own possession (47). While the term subsisted, his conveyance could pass nothing more than the fee expectant on the term. A fee expectant on a term of years is either a remainder or a reversion (48). A conveyance, whatever may be its form or mode, which passes only a remainder or reversion, is, in effect, a grant; the operation of a grant is always lawful, that of a discontinuance always wrongful; consequently the fine of *Edward* was not a discontinuance. 2. As to the principles of tenure applicable to this case—the term, the remainders, and the reversion, formed one inheritance. The entire fee was conveyed to the relesees in the settlement of 1708, from whose seisin all the limitations flowed. The particular tenant, remainder-man, and reversioneer, were connected together in privity of estate. If the limitations had been created at common law by feoffment, and the term had stood first, the livery must have been made to the termors, in whom the possession would have resided for the benefit of themselves, and of those in remainder and reversion, according to the order of the limitations (49). Their

(46) Litt. s. 608.

(47) If the position in Co. Lit. 332 b, (*ante*, 135, 136), be correct, this argument would appear to prove too much. Tenant in tail in possession, making a lease for years, and thereby converting his estate into a reversion capable of passing by grant, may yet, ac-

cording to Lord Coke, discontinue the estate tail. *Sed vide infra*, 180, note (92).

(48) See the next note.

(49) Litt. s. 60. "Remainder" is a residue of an estate in land, depending upon a particular estate, and created together with the same. Livery to lessee for years shall enure

possession would have been the possession—not merely in right of the term—not merely in right of the first particular estate of freehold—but in right of *all* the limitations considered as bound together by unity of seisin, and as constituting each an integral part of the same inheritance (50). So, in the principal case, when the particular estates for life, antecedent to the term, determined, the possession devolved upon the termors, who stood in precisely the same relation to the remainder-men and reversioner, holding the possession to the same extent, and upon the same principles of tenure, as if the estates had been created at common law, and the termors had been the original depositaries of the possession. When successive estates are limited, the immediate particular tenant is necessarily *in* of the whole and sole *possession*, which can reside only in one of several consecutive tenants at the same time; he is the “protector of the settlement;” to him is entrusted the conservation of the inheritance, of that seisin of the fee on the maintenance of which all the limitations depend. While the possession is full of the particular tenant, there can be no usurpation of the seisin; no wrongful displacing of the estates of the remainder-men and reversioner, the undisturbed continuance of whose rights is identified with his peaceable possession (51). The first step towards the acquisition of a tortious fee, the essential act, indeed, of such acquisition, is the ouster of

1832.



Doe

v.

Finch.

for the benefit of them in the remainder, for the livery of the possession could not be made to the next in remainder, because the possession belonged to the lessee; and for that the particular term, and all the remainders, make in law but one estate, and take effect at one time, therefore the livery is to be made to the lessee. Co. Litt. 49 a.

(50) A particular tenant, according to the feudal notions, was *in* of the seisin of the fee, of which his estate was a part. Per Lord

Mansfield, in *Taylor v. Horde*, 1 Burr. 60.

(51) “If one levy a fine of my land, while I am by myself, or my tenant, or by any person connected with me in privity of estate, as a prior tenant for life, &c., in possession of it, this fine will not hurt me.” Shep. Touchstone by Preston, 23. “So long as the donee in tail, lessee for life, or *lessee for years*, are in possession, they preserve the reversion in the donor or lessor.” Co. Litt. 324 b; 1 Tho. Co. Litt. 400.

1832.


DOE
v.
FINCH.

the tenant in possession, whether for life, in tail, or for years. There can be no ouster of a remainder-man or reversioner simply (52); no disseisin or discontinuance of less than the entire fee. The chain of limitations cannot be severed, it must be destroyed. These principles are so many landmarks, as ancient as tenure itself. Yet, in order to support the position—that the remainder and reversion were discontinued, while the term was preserved—the argument on the other side must contradict them all. The plaintiff will be obliged to contend, that the chain of limitations may be severed; that the first link, the term, may be preserved, and a new reversion be depending from it; that there may be a total change of title to the fee without any change of possession; that the remainder may be divested while the particular tenancy remains absolutely unaffected; that there may be a *new* and *wrongful* fee expectant upon an *old* and *rightful* particular estate; and that the termors, who received the possession on the tacit condition, annexed to every particular tenancy, of preserving and transmitting it according to the tenor of the original destination, and who by an unlawful assumption of ownership, (as by making a feoffment, or levying a fine,) would forfeit the possession to the remainder-man or reversioner, must, by judicial construction, be deemed to hold the possession against the rightful remainder-man and reversioner, and be compelled to attorn tenants to a wrong-doer.—But it may be objected, first, that the possession of a termor, as the immediate particular tenant, is the possession of those in remainder and reversion; and therefore, that *Edward* was seised of an estate tail in possession. The principle, rightly understood, is not disputed. The possession of the

(52) “I do not understand how there can be an actual ouster of a reversion.” *Bayley, J. in Doe d. Truscott v. Elliot*, 1 Barn. & C. 85. In *Margaret Podger’s case*, 9 Co. Rep. 105 *b*, Lord Coke observes, “If lessee for years is ousted, and he in reversion disseised, and

the disseisor levies a fine with proclamations, and the five years pass, as well the lessor as the lessee is barred by his non-claim.” Here it appears to be assumed that an ouster of the lessee is essential to the disseisin of the reversioner. *Et vide infra*, 180, note (92).

termors was so far the possession of the tenant in tail, as it was the lawful possession of the land, in right of the inheritance, according to the settlement; but it was equally the possession of those in remainder and reversion *after* the estate tail. The fallacy lies in the partial application of the principle; in treating the possession of the termors as the possession in respect of a given portion only of the inheritance, and not in respect of the entire fee. If the possession of the termors had relation to the *whole* inheritance, then *cadit questio*; for as their possession continued, that of the remainder-men and reversioner could not be discontinued. [*Taunton, J.* Is there any decision that a tenant in tail, in order to be capable of levying a fine, must be in the actual possession of the land, as contra-distinguished from the seisin of the freehold? *Parke, J.* "Tenant in tail in possession" means "in possession of the freehold."] The possession of the termors was the *rightful* possession of the freehold, which possession continued after the fine levied, and preserved the seisin of the remainder-men and reversioner. In truth, the principle is this—the termor *in* possession, as the first particular tenant, preserves the estates of all the remainder-men and the reversioner *not* in possession. But how does that assist the plaintiff's case? It may be objected, secondly, that if tenant in tail makes a lease for years, and afterwards levies a fine, that (according to *Coke*) is a discontinuance (53). But between that case, and the principal case, there is a broad distinction. [*Denman, C.J.* Have you any authority for such a distinction?] Where the tenant in tail, being seised in possession, makes a lease, to which no livery of the possession is requisite, the possession remains in him; the lessee being *in* under *him*, there is privity as between them, but no privity as between his lessee and those in remainder and reversion expectant on the estate tail. Here, the tenant in tail never had the actual possession, which was executed in the termors for the benefit of themselves, and of those in remainder and

1832.

 Doe
 v.
 Finch.

(53) Co. Litt. 332 b, *suprà*, 135. *Sed vide infra*, 180, note (92).

1832.

DOE
v.
FINCH.

reversion. The term was derived out of the seisin of the *settlor*, the termors were *in* by title paramount, and there did exist, as between them and the remainder-men and reversioner, that privity of estate which is of the essence of the defendants' argument. It may be objected, thirdly, that the utmost possible operation should be given to the fine, on the principle of *ut res magis valeat*, &c. [Taunton, J. In numerous cases the question has been, whether a prior term of years was barred by the operation of a fine. But if the argument for the defendants be correct, that question could never have arisen, since it would go to shew that the fine has no operation where there is a prior term of years.] The argument for the defendants denies only the *tortious* operation of the fine. Certainly the utmost lawful effect ought to be attributed to it. But every intendment is to be made against the tortious operation of assurances (54). If the extraordinary effect of a discontinuance were denied to *Edward's* fine, it would still have been abundantly operative as a bar to his issue in tail, and as a conveyance to the conusee and his heirs of an estate commensurate in point of duration with the continuance of such issue. The power of *discontinuing* the remainders and reversion by fine is not, like the power of *barring* them by a recovery, a right inseparably incident to an estate tail, and which cannot be restrained by condition or otherwise; for a condition prohibiting a tenant in tail from levying a fine to work a discontinuance is valid, as being in restraint of wrong (55).

Remitter.

II. If the fine worked a discontinuance, the tortious fee gained by it was defeated by remitter. If *Edward* had been tenant in tail, with the immediate reversion in fee in himself, his fine would have conferred a clear title to the fee simple; but the remainder in tail of his brother *Thomas* was interposed between his (*Edward's*) estate tail and the reversion in fee. Consequently, the reversion in fee, which he had

(54) *Vide supra*, 147, note (39). 10 Co. Rep. 36; *Croker v. Trevi-*

(55) *Mary Portington's case*, *then*, 1 Leon. 292.

by descent from *Thomas* the settlor, was discontinued. His will, therefore, could not operate upon that reversion (56). The wrongful fee simple gained by the discontinuance, and the rightful reversion in fee, could not possibly co-exist; but the wrongful fee, and the right of the reversioner to defeat it by a *formedon*, might and did subsist together; and while the wrongful *estate* passed by the will of *Edward*; the *right* descended to the heirs of *Thomas*, the settlor, to whom the reversion originally belonged. The effect of a fine by tenant in tail, with the immediate reversion to himself in fee, is to pass a clear fee simple; and the explanation commonly given of that effect is this,—the fine converts the estate tail into a base fee, which merges in the reversion in fee, reducing the reversion into possession, and consequently accelerating all incumbrances affecting it. Hence it might be inferred that *Edward's* reversion subsisted and passed by his will; and that when the mesne remainder in tail of *Thomas*, the brother, was extinct, it conferred on the devisees of *Edward* a title to the fee simple in possession. It is understood that the title first set up by the plaintiff was based on the devise of the reversion. But the fine does not produce its effect in the way described. The fine of tenant in tail may operate in various modes, as, 1. The fine of tenant in tail in possession, without proclamations (57), discontinues the estate tail, remainders, and reversion, and passes a tortious fee simple, defeasible only by a real action to be brought by the issue in tail, remainder-man, or reversioner. 2. The fine of tenant in tail in remainder, without proclamations, passes, as against

1832.

DOE
v.
FINCH.

Operation of
fine of tenant
in tail.

(56) *J.C.*, tenant in tail, and *R.C.*, reversioner in fee, made a lease for life, not warranted by the stat., 32 Hen. 8, c. 28, so that it was a greater estate than tenant in tail may make. *R.C.* devised the reversion, and died. Tenant in tail died without issue. Held, that the devise was void. "When they make a lease for life, it is an immediate wrong to the entail, and

discontinues the estate tail during the life of the lessee, and the tenant in tail hath gained a new fee, and is seized of a reversion in fee expectant on the estate for life during the lease, and it is a new reversion." *Baker v. Hacking*, Cro. Ca. 387, 405.

(57) *i.e.* a fine simply at common law. But, in point of fact, all fines are now proclaimed:

1832.

Doe

v.

Finch.

Base fee.

the issue, remainder-men, and reversioner, nothing more than the tenant in tail may lawfully convey, *i. e.* an estate for his own life only. 3. The fine of tenant in tail in possession, with proclamations, is, in regard to the issue in tail, not a discontinuance, but an absolute *bar* under the statute (58), and, in regard to the remainder-men and reversioner, a discontinuance; passing, therefore, a fee simple, lawful as against the issue in tail, and tortious as against the remainder-men and reversioner, who may defeat it by their real action. 4. The fine of tenant in tail in remainder, with proclamations, is likewise an absolute bar to the issue in tail under the statute, but does not discontinue the remainders and reversion; passing a fee determinable by the entry of the remainder-man or reversioner (59). In none of these instances can the estate acquired by the fine be called, with strict accuracy, a *base fee*. To create a base fee, there must be an express limitation (as to *A.* and his heirs, lords of the manor of Dale, or to *A.* and his heirs so long as *B.* shall have issue of his body); for a base fee, properly such, cannot arise by construction of law. Where the fine passes more than an estate for the life of the tenant in tail, it passes a fee, either determinable by entry, or defeasible by action, *i. e.* a fee simple defective in point of title. The base fee created by limitation determines *per se* when the time of its duration is fulfilled, but some act seems requisite to put an end to the fee created by the fine. Now, if *A.* tenant in tail, with remainder or reversion to *B.* in fee, levies a fine with proclamations, to the use of himself (*A.*) in fee, *B.*'s remainder or reversion is turned to a right of entry or (as the case may be) of

(58) 4 *Hen. 7*, c. 24, as expounded by 32 *Hen. 8*, c. 20.

(59) It may be added, that the fine with proclamations, even of an heir expectant in tail, levied in his ancestor's lifetime, will, if the estate descend upon him or his issue, be a bar to the issue in tail, (*Archer's case*, 3 Co. Rep. 90; Co. Litt. 373,) who cannot plead

partes finis nihil habuerunt, &c.

As against issue in tail, it is no objection to the validity of the fine, that neither the conusor nor the conusee had any estate of freehold in the land. *Hunt v. King*, Cro. Eliz. 610; *Doe d. Thomas v. Jones*, 1 Crompt. & Jerv. 528, as to which case, *vide infra*, 179, note (90).

action; and if *B.* afterwards releases his right to *A.*, the release will perfect *A.*'s title to the fee under the fine, by extinguishing the right. Upon the same principle, if *A.*, tenant in tail, with immediate reversion to himself in fee, levies a fine, he acquires the fee discharged from the right under the reversion, which being in himself, is extinguished in his fee under the fine. In each case, charges upon the reversion will be let in upon the fee acquired by the fine—not because the title of *A.* is substantially constituted of the reversion in fee reduced into possession—but, because his title to the fee simple is perfected by means of such reversion; and it would therefore be contrary to every principle of justice not to let in the incumbrances. And where tenant in tail, with immediate remainder to himself in fee, acquires a complete title to the fee simple by fine, it is yet more obvious that the hypothesis of a base fee merging in the remainder is untenable; for after a base fee there can be no remainder, but only a possibility of reverter. But admitting the hypothesis, it makes for the defendants; for if two fees of a different nature, viz. a base fee and reversion in fee simple, cannot stand together, still less can two fees of the same nature, viz. a fee simple in possession and fee simple in reversion, co-exist in the same person. As *Edward* had the fee simple in possession (for the term is laid, for the present, out of the case) under the fine, he could not have the fee simple in reversion under the settlement. If, after levying the fine, he had granted all his estate in the land, the fee would not have passed to the grantee. This proves that he no longer had the fee in reversion. He had, therefore, nothing to devise, except the tortious fee simple acquired by the fine; and that was defeated by the entry of *Thomas* the nephew, to whom *Edward* devised a legal estate for life, so that on the death of *Thomas* the brother, as well such legal estate (*a*), as the right to the remainder in tail limited to *Thomas* the brother by the settlement, devolved upon *Thomas* the nephew. Then it is clear law, according to *Little-*

1832.
 }
 DOR
 v.
 FINCH.

(a) *Sed vide infra*, 168, note (61).

1832.

DOE
v.
FINCH.

ton(60), that *Thomas* the nephew, having two titles, a more ancient title, (*i. e.* the right to the estate tail under the settlement,) and a later title, (*i. e.* the estate for life under the will,) and coming to the possession by the later title, must be adjudged *in* of his elder and better title. By his remitter the title of the devisees of *Edward*, founded upon the discontinuance, was subverted.(61)

Discontinu-
ance.

Follett, in reply. I. It is insisted that there was no discontinuance, because the party was not in the actual bodily possession of the land. All that is meant in the old books, where they say that a tenant in tail, in order to give effect to a fine, must be in possession by virtue of the entail, is, that he must be seised of the estate; for by "possession" of an estate tail, nothing more is meant than seisin of the freehold. The party must be in the actual seisin of the estate tail by virtue of the entail itself, otherwise the fine does not operate to discontinue the estate tail, or displace the remainders; but it is not required that he should be in the bodily possession of the land. [*Patteson*, J. The estate tail must be the first estate of freehold.] In *Driver v. Hussey* (62), it was stated at the bar, and assented to by the Court, that in order to work a discontinuance of the estate tail, the party discontinuing must be actually seised by force of the entail. If the party be so seised, his fine will operate to discontinue the estate tail, and also to divest the remainders. If the doctrine which has been contended for were correct, no fine could be effectual where there is even a tenancy from year to year. [*Parke*, J. That is, no fine could operate as a discontinuance.] No mode has been pointed out in which it is to operate, if it be not allowed to have the effect of discontinuing the estate tail, and divesting

(60) S. 659, 682, 673. The law favoureth a remitter, being a restoring to right. Co. Litt. 348 a., 353 b., 354 a., 357 a.

(61) The wrongful estate for life, by devise, though a future interest, vested in *Thomas*, the

nephew, on the death of his uncle, *Edward*; but the right to the estate tail did not descend to and vest in him until the death of his father. *Vide infra*, 172, 175, n., 176, n.

(62) 1 Hen. Black. 269.

the remainders. The authorities shew that, where a freehold estate is outstanding, the fine will not operate as a discontinuance; but that where the estate tail is expectant on a term of years only, the fine does so operate. In *Doe dem. Maddock v. Lynes* (63), the question was, whether the effect of the feoffment was to bar the term; and the Court decided, by analogy to the cases which have been cited for the plaintiff, that the term was not destroyed, because the feoffment was made tortiously without the assent of the termors. There are numerous cases to the same effect. No case has been cited to establish the doctrine contended for on the other side, which must go this length—that if any person is entitled to the possession of the land, either from year to year, or in any other shape, the fine of a tenant in tail will not have the effect of destroying the estate tail and divesting the remainder. But it is said that *Littleton* applies the word “remainder” to an estate of freehold limited after a term for years, and coupling that passage with other passages from *Littleton* and *Coke*, it is contended that where there is a tenancy for years, with remainder in tail, the fine of the tenant in tail has no effect. *Coke-Littleton* was also quoted to shew that the estate tail of *Edward* would have passed by grant. The passage is this—“It is a maxim of law that a grant by deed of such things as do lie in grant, and not in livery of seisin, do work no discontinuance; but the particular reason is, for that of such things the grant of tenant in tail worketh no wrong, either to the issue in tail, or to him in reversion or remainder.” (64) Now, the question is, what is meant by “reversion or remainder”? It here means a reversion or remainder expectant on an estate of freehold, for in the very same page it is laid down that “If tenant in tail make a lease for years of lands, and after levy a fine, this is a discontinuance, for a fine is a feoffment of record, and the freehold passeth; but if tenant in tail maketh a lease for his own life, and after levy a fine, this is no discontinuance (65),

1832.



DOE
v.
FINCH.

(63) 3 B. & C. 388; 5 D. & R.
161; *supra*, 147, note (39).

(64) Co. Litt. 332 a.

(65) *Ib.* 332 b. See the autho-

1832.

DOE
v.
FINCH.

because the reversion expectant upon an estate of freehold, which lieth only in grant, passeth thereby." Therefore, the passage referred to, is, in truth, a distinct and direct authority against the defendants. *Comyns* (66) lays down the same rule, and after referring to several authorities to shew that in cases where an estate tail is expectant on a freehold estate, the fine of the tenant in tail does not operate as a discontinuance, adds, that if he lease for years, and then levy a fine, it will be a discontinuance, for then the freehold passeth by the fine. It is, consequently, unnecessary to enter into the question whether or not a remainder expectant on a term of years will pass by grant; there may, perhaps, be ground to contend that it will so pass. The question here is, whether the party was not seised of the freehold, whether he was not in possession of the estate tail by force of the entail, and not whether he had leased the land for years, or whether there was a prior term of years; for if the Court were to hold such lease or term sufficient to prevent a discontinuance, almost every fine levied by tenant in tail would be ineffectual, since it can rarely happen that the tenant in tail is in the actual occupation of the land. If, in the language of the case of *Driver v. Hussey*, he be seised of the freehold, that is all which the law requires. Authorities have been cited to shew that the Court would not hold this a discontinuance, because discontinuance is a wrong, conferring a tortious title to the fee on the conusee of the fine. Admitting that the fine of a tenant in tail does give a tortious fee, (that it gives a fee, is quite clear,) still the books draw a distinction between a fee acquired by a tenant in tail levying a fine, and a fee acquired by disseisin. Before the statute *de donis*, a tenant in tail had a right to alienate his estate (67); now

rities cited by Lord Coke, *ante*, 135, note (13); *et vide infra*, 180, note (92).

(66) Com. Dig. title "Discontinuance," C. 3. *Et vide infra*, 180, note (92).

(67) At common law, if *A.* had

given land to *B.* and the heirs of his body, rendering 10*l.* annual rent, *B.* might, after issue born, have aliened in fee simple to *C.*, a stranger. Which conveyance, as the statute of *quia emptores* (18 *Edw.* 1, st. 1, c. 1,) did not

Alienation by
donee in tail at
common law.

the Courts allow him to alienate his estate by levying a fine. Thus the effect of the fine levied by the tenant in tail is merely to alienate his estate; as before the statute he might have done without the fine. It is not like the ordinary case of a tortious fee acquired by a wrongful entry; but were it so, that would be no reason for refusing to adhere to the settled doctrine, which, on this point, expressly declares that a tenant in tail in possession of the freehold under the entail is competent to discontinue by fine.

II. As to the ultimate reversion to the right heirs of the

pass until after the statute *de donis*, (13 Edw. 1, stat. 1, c. 1,) might have been of the whole of the lands, *tenendum* either of himself or of *A.*, at his election, under Magna Charta, (9 H. 3, c. 32,) Co. Litt. 43 *a*, or it might have been an alienation of part of the lands *tenendum de se*. In either case the land would have remained subject to the services which had been originally reserved, and *A.*'s seignior, his rents, and his right of re-entry, upon any event except the failure of issue of *B.*, would have continued unimpaired. The statute *de donis* prohibited all alienations of the estate tail, as well after as before issue had by the donee. Notwithstanding the opinion expressed by the king (Edw. 1), in the preamble to this statute, as to the utility and necessity of such an enactment, the judges appointed by his more immediate successors appear, like an eminent modern writer (Smith, W. N. 2 vol. 84, 85), to have considered the doctrine of entails to be "founded upon the most absurd of all suppositions, the supposition that every successive generation of men have

not an equal right to the earth and all that it possesses, but that the property of the present generation should be restrained and regulated according to the fancy of those who died perhaps 500 years ago." In their anxiety to unfetter the inheritance, the judges, however, went much further than simply to enable the donee to elude the restrictions upon alienation imposed by the statute *de donis*. By permitting *D.*, a stranger, to recover by a collusive action against *B.*, the donee, they empowered *B.* to alien before, as well as after, issue born, and enabled *D.* to hold the lands, not as the alienee of *B.* at common law would have done, but absolutely discharged from any liability to the payment of the rent or the performance of the services. And thus, by a palpable fraud, the rents and services, and the reversion of *A.*, the donor, were as completely destroyed as if, at the time of their creation, *A.* had been a mere disseisor, whose wrongful acts had been then defeasible and were afterwards defeated by the assertion of an elder and better title on the part of the recoveror.

1839.

Dox
v.
Finch.

Alienation since
the statute.

Prohibition
of alienation
by statute
de donis.

1832.

Doe

v.

Fletcher.

settlor, which descended to *Edward*, and which is said to have been destroyed by the fine—*Edward* had not only the reversion, but also the new fee acquired by the fine. It is quite sufficient that the new estate in fee passed by his will.

Though it is no longer contended that the entry (68) of *Thomas* the brother, who was merely equitable tenant for life, operated as a remitter, yet it is now urged that *Thomas* the nephew, who took a legal estate under the will of *Thomas* the brother, was remitted to the estate tail created by the settlement. We answer that the recovery of *Thomas* the brother would be a bar; for *Thomas* the nephew could not enter under the old right while the recovery of his father remained unreversed, because that would operate to prevent the right to the old estate tail from vesting in him. Though the recovery was bad, as there was not a good tenant to the *præcipe*, yet the estate tail was destroyed by it. That of itself would be an answer. In *Co. Litt.* (69) it is laid down, that “regularly a man shall not be remitted to a right remediless, for the which he can have no action; for *Littleton* here saith, there is no person against whom the issue, when he cometh to the land, without folly may bring his action; and saith also that this is the principal cause of the remitter, for neither an action without a right, nor a right without an action, can make a remitter. As if tenant in tail suffer a common recovery, in which there is error, and after tenant in tail dissaieseth the recoveror and dieth;

Interesse termini.

Estate cast upon devisee before entry.

(68) Upon a demise for years the lessee has no estate until entry; before which he has merely an *interesse termini* (*ante*, 28 (a)). Upon a devise the estate vests in the devisee immediately upon the death of the deviser (*Townson v. Fickell*; 3 Barn. & Ald. 31; *Small v. Marwood*, 4 Mann. & Ryl. 190 n.; *post*, 175, n. 176, n.; *Doe d. Smyth v. Smyth*, 9 D. & R. 136, 6 Barn. & Cr. 112); and the effect of the entry of the devisee is merely

to defeat his power of disclaiming the estate. It is conceived that the remitter would (at least in the case of disability in the devisee) take effect upon the vesting of the estate by the death of the deviser, though both the estate and the remitter would, until entry, or some other act shewing an agreement to the devise on the part of the devisee, be defeasible by disclaimer.

(69) 349 & 3 *Tho. Co. Litt.* 182, 190, 192.

1832.
 Dox
 v.
 Finch.

here the issue in tail hath an *action*, viz. a writ of error; but as long as the recovery remaineth in force (70) he hath no right, and therefore in that case there is no remitter." That is a distinct authority. But there is another reason why the doctrine of remitter does not apply; which is, that *Thomas*, the nephew, took an estate, if at all, under the statute of uses. If so, the doctrine of remitter is excluded. He should at once have waived his right to enter under the statute, and have brought his real action. In order that the doctrine of remitter may apply, the defeasible estate must be thrown on the person having the right without any act or concurrence of his own. Lord Coke observes (71) "since *Littleton* wrote, and after the stat. 27 Hen. 8, c. 10, if tenant in tail make a feoffment in fee to the use of his issue, being within age, and his heirs, and dieth, and the right of the estate tail descend to the issue being within age, yet he is not remitted, because the statute executeth the possession in such plight, manner, and form, as the use was limited. But if the issue in tail in that case waive the possession, and bring a *formedon* in the descender, and recover against the feoffees, he shall thereby be remitted to the estate tail, otherwise the lands may be so incumbered as that the issue in tail should be at a great inconvenience; but if no *formedon* be brought, if that issue dieth, his issue shall be remitted, because an estate in fee simple, at the common law, descendeth unto him." These two answers are decisive. [*Taunton*, J. How does it appear that *Thomas*, the nephew, came in under the statute of uses?—That will appear on reference to the will of *Edward*. [*Taunton*, J. The will of *Edward* must be thrown out of the question. *Thomas*, the nephew, disclaimed that—did he not?—He should have done so, but he did not. [*Taunton*, J. The counsel for the defendants disclaim that

(70) But in the principal case the recovery never was in force; being a nullity *ab initio*, inasmuch as *Thomas* the brother, who conveyed

to the tenant to the præcipe, and was vouchee in the recovery, had only an equitable life interest.

(71) Co. Litt. 348 b.

1832.

DOE
v.
FINCH.

will, and say that *Edward* had no right to make it. There is nothing to shew that *Thomas*, the nephew, entered under the will of *Edward*, or that he claimed under it.]—It does not appear how he entered. [*Taunton, J.* Then I do not see how he can be said to claim under the statute of uses, because that can only be under the will of *Edward*.] He must have been *in* by force of the statute of uses, because he had no legal title to enter in any other way than under *Edward's* will; and the doctrine of remitter does not apply unless the party enters by virtue of a legal title. [*Taunton, J.* If he entered under the will of *Edward*, *cadit questio*.] But it is insisted on the other side, that *Thomas* the nephew having entered under the will of *Edward*, who gave only a limited estate, was remitted back to the old estate—the tenancy in tail under the settlement. It is essential to remitter that the defeasible estate of freehold and the right to the old estate should centre in the same person. What means, then, did the defeasible estate, which was acquired by the fine of *Edward*, vest in *Thomas*, the nephew? It could come to him only under the will of *Edward*. *Thomas*, the brother, who suffered the recovery, could not pass the defeasible estate to the nephew. [*Taunton, J.* We are brought back to the first question. They say that this fine did not discontinue the estate tail, or displace the remainder, which belonged to *Thomas*, the brother, who therefore, upon the death of *Edward*, entered by virtue of that remainder.] Undoubtedly that is the first point; but they make a second—that, supposing the fine to have operated as a discontinuance, thereby displacing the remainder, *Thomas*, the nephew, when he entered, was remitted to the original estate tail. To this argument, his acceptance of a life estate under the will of *Edward*, a will deriving its effect from the statute of uses, would be an answer; and the recovery would be an answer. But in truth the only point in this case is the effect of the fine; for if the fine operated to discontinue the estate tail and remainder, the plaintiff is entitled to recover. [*Patteson, J.*

If the estate tail was not discontinued, the recovery would be good, and then *Thomas* the nephew would take only an estate for life under the will of *Thomas* the brother.]

1882.
DOE
v.
FINCH.

DENMAN, C. J.—This is a case of a fine levied by a person who had become tenant in tail under a settlement. If he was tenant in tail, he was competent to levy a fine; and no argument or authority has been adduced to shew that his fine would not have all the legal consequences which belong to a fine in ordinary cases. We asked the defendants' counsel for some authority to that effect, but none has been brought forward, and, indeed, some of the cases cited on the part of the defendants appear to me to establish the contrary doctrine. When it is said that the possession of the tenant for years is the possession of the party entitled to the freehold, that imports that the party is seised of the estate of freehold. The tenancy for years does not enter into the question. The question is not whether the party is entitled to corporal possession of the land, but whether he is seised of a present estate of freehold. The argument for the defendants must go the whole length of shewing that in order to levy a fine that shall be binding, the party must be entitled to the actual possession of the land itself. It follows, therefore, from the very first elements of the doctrine of discontinuance, (according to which a tenant in tail levying a fine shall displace the remainder) that *Edward* being tenant in tail, and having levied a fine, has displaced the remainder that resided in his brother *Thomas*. The representative of that brother has not taken any steps to set aside the tortious estate (if it be properly so called (72)) which *Edward* obtained by the fine. That estate was a descendible and devisable estate. He did devise it, and under that devise the lessor of the plaintiff claims. It seems to me, therefore, that all the steps of the plaintiff's argument are complete; that the party had in him an estate of which a fine might be levied; that he duly levied a fine; that by such fine the remainder, which would other-

Effect of fine.

(72) *Vide supra*, 143, note (25), 154, note (54).

1832.

DOE
v.
FINCH.

wise have taken effect, has been discontinued and displaced; and that nothing has been done to set aside that which may be contended to have been unlawfully (72) done. On this short ground I am of opinion that the plaintiff has established his right to recover.

Effect of fine.

PARKE, J.—The question turns on the two points urged in the argument for the defendants. The first question is, what was the effect of the fine levied by *Edward*? He was tenant in tail in possession of the freehold, subject only to the term of 500 years; and no authority has been cited to shew that such a tenant levying a fine, does not work a discontinuance of the estate tail (73) and remainders. To that effect the authority in *Co. Litt.* is express—"if a tenant in tail make a lease for years of land, and afterwards levy a fine, this is a discontinuance, for a fine is a feoffment of record, and the freehold passes (74)." The authority relied on to the contrary, is the former passage in *Littleton* (75), which, it is said, shews that where the remainder lies in grant, a fine shall not operate as a discontinuance. But that passage clearly refers only to things (such as rents, commons, and advowsons,) which lie in grant, and not to a remainder or reversion (76), after an estate for years, (which, as we have just seen, is one of the cases of discontinuance put by Lord Coke immediately after the passage in *Littleton*,) for *Littleton* says, "and note that of such things as pass by way of grant, by deed made in the country, and without livery, there such grant maketh no discontinuance, as in the cases aforesaid." Now "the cases aforesaid" are cases of persons who by deed grant a rent, advowson, or common, to another in fee (77). The uniform course of opinion in the profession, so far as my knowledge extends, is, that, in cases of this kind, an estate

Estate for
years to be
disregarded.

(72) *Vide supra*, 143, note (25), 164, note (54).

(73) The defendants' argument appears to have been (*supra*, 154) that the estate tail of the conusor (the fine being with proclamations,)

was barred, not discontinued. *Vide infra*, 178, n. (90).

(74) 1 Inst. 333, b.

(75) S. 618.

(76) *Supra*, 150.

(77) S. 615, 616, 617.

for years goes for nothing. The real question, therefore, is, whether *Edward* was the tenant in tail in possession of the freehold. That he unquestionably was; and his fine consequently displaced the remainder. The second question is, what was the effect of this fine on the estate of the consor? Its effect was to destroy the estate tail, to turn the remainder into a right, and to give to himself a base fee, that is, an absolute fee determinable only by a formedon to be brought by the remainder-man; in addition to which, *Edward* had the reversion in fee(78). These two estates, taken together, were a devisable interest, on which his will operated. For these reasons, it appears to me that the lessor of the plaintiff has a good title to recover.

1832.

Does
the
Fine.

Base fee.

Devisable
interest.

TAUNTON, J.—There is no rule better established than that a fine levied by a tenant in tail, with remainders over, works a discontinuance of the estate tail(79), divests the remainders and reversion, and puts them to a right. But it is said, that in this instance the term of 500 years prevented the fine from working a discontinuance. Now, I asked the defendants' counsel several times for an authority that where tenant in tail is seised of the estate tail, subject only to a term for years, the ordinary operation of a fine in

Effect of fine.

(78) The argument for the plaintiff was necessarily directed to establish that the fine of *Edward* acquired a tortious fee simple, an effect which it could not produce without putting the reversion to a right of action. His estate in fee under the discontinuance was clearly a devisable estate; but the mere right in respect of the reversion was not devisable. It is conceived that there were not two estates in fee, which, taken together, constituted one devisable interest, but an estate and a right, the former of which depended for its continuance upon either the destruction or the non-assertion

of the latter.

"A tenant in tail who levies a fine, instead of having his old estate tail under a resulting use, will have a fee simple, in case the fine operates a discontinuance, and a base or determinable fee, in case the fine operates merely and simply as a conveyance." 1 Preston's Conv. 317. If the fine operated here only by way of conveyance, then its operation would cease upon the death of *Edward*, the consor, without issue in tail, and the recovery suffered by *Thomas*, the brother, would be valid.

Base fee.

(79) *Vide supra*, 183, note (3).

1839.

DOR
v.

FINCH.

working a discontinuance of the estate tail, does not take place; but no such case can be produced. On the contrary, there are many cases which prove that the possession of the termor is the possession of the person seised of the next immediate estate of freehold. The rule, as furnished by the text books, is, that no person can create a discontinuance who is not in the actual possession—not who is not in possession, or entitled to the possession, of the *land*—but who is not in the actual possession of the *estate tail* by force of the entail (80). It is clear that notwithstanding

Possession.

(80) When one is in the condition of having a legal interest, to which the *possession* of the *subject* is annexed, and that subject is land, he may then be said, with strict technical propriety, to have an estate in *possession*. The possession may belong to him in respect of an interest for years, for life, in tail, or in fee; but whatever may be the *quantum* of his interest, the possession resides wholly in him. When the possession of a tenant for years, for life, or in tail, is said to be the possession of those in remainder and reversion, nothing more appears to be meant than that the particular tenant has not the whole interest in the subject, but holds the possession, as well for his own benefit, to the extent of his immediate partial interest, as for the benefit of those in remainder and reversion to the extent of their future interests, to be preserved and transmitted, or, in technical language, to *remain* or *revert*, according to the intention of the common author of the limitations. Such a tenant may be guilty of a wrong or tort, because he may alien the *possession*, which was confided to him as being entitled to the present enjoy-

ment of a limited interest, for a period exceeding that interest, in derogation of the rights of those in remainder or reversion; but a remainder-man can do no wrong, because he cannot alien the possession, and in departing with his interest merely, his alienation cannot be otherwise than rightful. On a feoffment by *A.* to *B.* for life, remainder to *C.* in tail, with reversion to *A.* in fee, livery of the possession is made to *B.*, whose possession preserves the expectant limitations to *C.* and *A.* If *B.* afterwards leases to *D.* for a term of years, then it may be said, that as the lessee's title is perfected by entry, without transmutation of possession by livery, *B.*'s possession continues unimpaired:—the term is parcel of his particular freehold. But on a feoffment by *A.* to *D.* for a term of years, remainder to *B.* for life, remainder to *C.* in tail, with reversion to *A.* in fee, livery of the possession is made to *D.* (the termor), whose possession preserves the expectant limitations to *B.*, *C.* and *A.* (Co. Litt. 324 b):—the term is parcel of the fee. In the former example (which is the case put by Co. Litt. 332 b, and relied on for the plain-

the prior term of years, *Edward* was in the actual possession of the estate tail by force of the entail. The only authority which, in the slightest degree, sustains the argument on the part of the defendant, is the position laid down by *Littleton* and Lord *Coke*, that there can be no discontinuance of things lying in grant. *Littleton* puts the instances only of a rent, advowson, or common, and says if tenant for life of a rent, advowson, or common, levy a fine, or make a feoffment, with warranty, there is no discontinuance, for nothing passes but during the life of tenant in tail, which is lawful. But the argument is, that a remainder or reversion, after a term of years, lies in grant, and that, therefore, the remainder in question was grantable. I doubt very much the correctness of that proposition. At common law, rents, commons, advowsons, and things of that nature, passed by a mere deed of grant, but it was otherwise with remainders and reversions, after an estate for life or for years; because there the conveyance required to be perfected by the attornment of the tenant, so that remainders and reversions did never lie *simpliciter* in grant, the assent of a third person being necessary⁽⁸¹⁾. Attornment has

1832.

 Doe
 v.
 Finch.

tiff in the principal case,) the immediate possession belongs to *B.* in right of his estate for life; in the latter example (which seems analogous to the principal case) the immediate possession belongs to *D.* in right of his estate for years. In each case, the remainder and reversion will subsist as *estates*, or, in other words, will stand as originally destined to take effect, so long as the possession is in conformity to the livery by which they were created. If the possession be disturbed or wrongfully aliened, they will be turned to *rights*,—either of entry or of action, according to the nature of the disturbance or alienation. The same principles hold where

the limitations are created by way of use: for when uses have received their legal clothing from the statute, they are governed by the rules of the common law; as appears from the fact of life estates created by way of use being liable to forfeiture, and contingent remainders so created being liable to fail or be destroyed—both consequences of *tenure*, which is an incident not to a *use*, but to an *estate*.

(81) It does not appear that Grant. either *Littleton* or *Coke*, in treating of discontinuance, makes any distinction between rents, &c. and remainders or reversions in land. As all these subjects are alike incorporeal, any such distinction

1832.

Doe

v.

FINCH.

Attornment.

Base fee.

been done away with by the statute of *Anne*; but we are to consider the law with reference to the state of things in the time of *Littleton* or Lord *Coke*. The fine, therefore, operated as a discontinuance, and *Edward*, the comor, gained a base fee. Being seised of that base fee, he devised a life estate to his brother *Thomas* (82), with remainder to his nephew *Thomas* in tail, with the ultimate remainder to Dr. *Edward Cooper* in fee. Then the only remaining question is, whether a person seised of a base fee has the same right to devise it as a person seised of a common fee simple. There can be no doubt upon that point. It was decided in *Roe v. Jones* (83), that "a possibility coupled with an interest" is devisable; there the interest was the benefit of an executory devise. In *Goodright v. Forrester* (84), the Court held that a mere right of entry was not devisable; but that is a very different matter from a possibility coupled with an interest, which is devisable because it is assignable; but a right of entry cannot be assigned, and therefore is not devisable (85). The owner of a base

would appear to be extremely subtle. Lord *Coke*, however, says, "if tenant in tail of a rent service, &c. or of a reversion or remainder in tail, &c., grant the same in fee, with warranty, and leaveth assets in fee simple and dieth, this is neither bar nor discontinuance to the issue in tail." Co. Litt. 332 b. Commons and advowsons always lay *simpliciter* in grant; but at common law attornment was necessary to perfect the grant of a rent. Indeed, in one of the instances here referred to, in which *Littleton* (s. 616) puts the case of a rent, he says, "if a man hath a rent-service, or rent-charge in tail, and he grants the said rent to another in fee, and the tenant *attorns*, this is no discontinuance." Certain statutes (27 Hen. 8, c. 10, 4 & 5 Ann. c. 16, and 11 Geo. 2,

c. 19), have, by rendering attornment unnecessary, facilitated the passing of remainders and reversions by way of grant; but which do not, therefore, at this day appear to lie either more or less in grant than when *Littleton* wrote.

(82) Supposing a devise by way of use to operate under the statute of uses (*vide infra*, 175, n.), the will of *Edward* gave *Thomas*, the brother, only an *equitable* life interest.

(83) 3 T. R. 88, 1 H. Bla. 30; *et vide infra*, 171, n.

(84) 8 East, 564, 1 Taunt. 587.

(85) 8 East, 352, 1 Taunt. 378. In the Exchequer Chamber, the point (whether a right of entry be devisable or not) was discussed, but not decided. Sir *J. Mansfield*, C. J. inclined to the opinion that a right of entry was devisable. But

fee, although a defeasible fee, may devise it under the very words of the statute of wills, the 32 Hen. 8, which enacts that "every person having, or which hereafter shall have, any lands, tenements or hereditaments holden in socage, or of the nature of socage tenure, and not having any manors, lands, tenements, or hereditaments, holden of the king by knights' service, by socage tenure in chief, or of the nature of socage tenure in chief, nor of any other person or persons by knights' service, shall have full and free liberty, power and authority to give, dispose, will and devise, as well by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life, all his said manors, lands, tenements or hereditaments, or any of them, at his free will and pleasure."

1832.

Doe
v.
Finch.

With respect to the point, not strongly pressed, of remitter, it does appear to me, for some of the reasons assigned by the plaintiff's counsel, that under the circumstances of this case, the doctrine of remitter cannot apply.

Remitter.

PATTESON, J.—I am entirely of the same opinion. With respect to remitter (assuming there has been a dis-

it seems clear that a right of action is not. And in *Doe d. Souter v. Hale*, 2 Dowl. & R. 38, it appears to have been taken for granted that a right of entry was not devisable. And see, 1 Jarman, Dev. 33. The benefit of an executory devise, or contingent remainder, is not transferable at law (although it may be bound at law by estoppel, *Doe v. Martyn*, 8 Mann. & Ryl. 485, 8 Barn. & C. 497; *Doe v. Oliver*, 5 Mann. & Ryl. 10 Barn. & C. 181; or in equity by contract), nevertheless it is devisable. It should seem not to be a necessary inference that an interest cannot be devised because it cannot be assigned. The argument for the defendants does not appear to deny that the

fee gained by *Edward's fine* (if the fine worked a discontinuance), was devisable. Neither party appears to have relied upon any analogy between the actually existing, and immediate, though tortious fee, acquired by the fine, and the interest of an executory devisee.

It may be observed that every *interest* in land, whether vested, *contingent*, or executory, is devisable, but that a *possibility* is not devisable; and when the books say that "a *possibility* coupled with an interest" is devisable, what they really mean seems to be this—that an *interest* depending on a *possibility* (i. e. on the happening of a possible *contingent* event) is devisable.

Possibility coupled with an interest.

1832.

DOE

v.

FINCH.

Remitter.

continuance of the estate tail) the answer given by the plaintiff's counsel is correct; for if *Thomas*, the nephew, entered under the will of his father, *Thomas*, he affirmed the recovery suffered by his father, and was bound by the recovery; and he could not be remitted to any other estate, because, so entering, he would take an estate for life under his father's will. If he did not enter under that will, he must have entered under the will of *Edward*, and he would then be met by the objection that the will of *Edward* operated under the statute of uses, so that he was in by force of that statute (86). In either case, the doctrine

(86) With respect to the first difficulty which appears to have presented itself to the mind of the learned judge, namely, that if *Thomas*, the nephew, entered under the will of *Thomas*, the brother, such entry was in affirmance of the recovery suffered by *Thomas*, the brother, it may be proper to observe that if the fine was a discontinuance, the recovery of *Thomas*, the brother, was void, and he had nothing to devise.

Disallowance of remitter under statute of uses.

The other objection assumes that the statute of uses extends to devises. If this be so, it becomes necessary to consider to what extent the statute of uses, whether operating upon a devise or upon any other species of conveyance, forms an obstacle to remitter. The statute of uses directs that the estate, title, right, and possession that was in the persons seised of lands, tenements, or hereditaments, to the use, confidence, or trust of any persons, be clearly deemed and adjudged to be in them that have such use, confidence, or trust, after such quality, manner, form, and condition as they had before

in or to the use, confidence, or trust which was in them.

Upon a somewhat narrow construction of this act of parliament, it was held, that as the *cetteux que* use would not before this statute have been remitted, by reason of their interest in the use, the allowance of a remitter would give them an estate in the land different in quality, manner, form, and condition from the interest which they had in the use.

First reason assigned for such disallowance.

Another reason given for the disallowance of the remitter is, that the statute of uses enacts "that he who hath any use in remainder or reverter, shall be adjudged in lawful seisin, estate, and possession of the lands and tenements, remainders, reversions, &c. of the like estate as he had in the use;" and that if the person seised of the first estate in the use were remitted, those in remainder and in reverter would not become seised as the statute requires.

Second reason assigned.

A third reason given is, that the assent of every subject to the passing of every act of parliament being implied by law, *cestui* Third reason assigned.

of remitter would not apply. The question then is reduced to this—whether the fine levied by *Edward* worked a

1882.
Doe
v.
FINCH.

que use takes the estate executed by the statute, by his own act. Vide Hobart, 256.

Observations on first reason.

With respect to the first of these reasons, it may be observed, that the intention and even the words of the statute would have been satisfied by passing to cestui que use an estate in the land commensurate with the interest which he had in the use, leaving the common law to regulate the consequences of the acquisition of such estate. This construction, though not adopted with reference to remitter, does not appear to have been called in question with respect to immediate merger or subsequent forfeiture, and other incidents to which uses were not liable. It has never been contended that upon a feoffment to *A.*, to the use of *B.* for life, remainder to the use of *B.* in fee, *B.* shall have an estate for life, distinct from his remainder in fee, as he would have had in the use before the statute.

Observations on second reason.

With respect to the second ground, the words of the statute do not appear to be framed for the purpose of rendering remainders or reversions more indestructible when executed by the statute, than when created at common law; and it is clear that the entry of the issue in tail under a particular estate created by discontinuance, and cast upon him whilst under disability, or without his own act, would destroy the remainder or reversion expectant upon such particular estate.

Observations on third reason.

The third ground appears not

to be tenable. The doctrine of the implied assent of every subject to acts of parliament is convenient for the purpose of avoiding all discussion as to the binding operation of a statute; but it would be too much to say, that the transfer of an estate by virtue of an act of parliament framed in 1534, must be taken, as against a person born in 1800, to be equivalent to a transfer made with his express co-operation and assent.

When in the course of the three days' argument in *Amy Townsend's* case, it was objected (*Plowd. 112 a.*) that if the party (the wife of the discontinuor) were not remitted, it would be in the power of the husband, by means of the discontinuance, to let in incumbrances to the full value, to take precedence of the estate limited to the use of the wife, under the feoffment, by which the discontinuance was effected, it was answered (*ibid. 114 a.*) that "she might after the death of her husband disagree to the use and possession conveyed by means thereof, and bring her action of *cui in vita* against him who is the next in remainder: for the bringing of her action against him is a disagreement in the wife, and then the possession vests in the next in remainder, as if the wife had not been named, or as if she had been named and were a dead person in law. As if the use had been appointed to the wife in fee, then the wife might bring her action of *cui in vita* against the feoffor or his heir, and they should

Fourth reason assignable.

1832.

DOE
v.
FINCH.

discontinuance or not? And as to that, I confess it does appear to me to be an extremely plain case. It is clearly

be tenants to her action. For when a feoffment is made to the use of one in fee who refuses, it is as if it had been appointed to the use of a friar or monk, or to the use of an inanimate thing, and then the feoffment is without consideration, and shall be to the use of the feoffor. And so the wife has a tenant to her *cui in vitâ*, and by the bringing of it she might purge and avoid all incumbrances." This may be considered as furnishing a fourth reason for disallowing the remitter. The principle of remitter is stated to be, that there is no person against whom the party who has the ancient right coupled with a defeasible estate of freehold can bring his action. But as *cestui que use* may, by simple disagreement, without a formal disclaimer (4 Mann. & Ryl. 191, n.; 5 Mann. & Ryl. 148, n.), waive the use which the statute would have executed in him, and bring his action against the remainder-man, or, if there be no remainder limited by the feoffment or other deed creating the use, then against the *feoffor* (Plowd. 114 a, b; 1 Leon. 198, 199), or as Lord Coke seems to think (contrary, however, to the authorities, even those cited by himself), against the *feoffees* (Co. Litt. 348 b), the occasion for the remitter, where the party takes the defeasible estate of freehold under the statute of uses, seems to fail.

Remitter of party taking defeasible estate of freehold by descent from *cestui que use*.

It is obvious that these four reasons, whether good or bad, apply exclusively to the party in whom the use is executed, and

not to those who take by descent from such party, and who therefore take the defeasible estate at common law, without power to disagree. 34 H. 8, Bro. Abr. tit. Remitter, pl. 49; *Bridgman v. Charleton*, 2 Roll. Abr. 419, and 1 Roll. Rep. 260; Anon. but S. C., ut videtur, Fra. Moore, 846; *Wentworth v. Stanley*, Lane, 93. Where indeed a statute gives an estate to A. (by name) and his heirs, neither A., nor any heir of A., can be remitted; per *Englefield*, J. 29 H. 8, Bro. Abr. Remitter, pl. 49. This position was used by *Finch*, arguing in *Wentworth v. Stanley*, to prove that the issue of the party in whom the use had been executed by the statute of uses, could not be remitted; but the Court held otherwise.

In the principal case, however, Who a *first taker*. *Thomas* the nephew, who took a portion of the wrongful estate created by the fine, was *in*, not by descent, but as the *first taker* under a use in remainder, limited by the will of *Edward*. It is true that a prior estate is limited during the life of his father; and it would appear that with reference to the remainder to *Thomas* the nephew, it is not material (*vide tamen supra*, 134) whether the preceding estate is given to the father for his own life, or to other persons during the life of the father. But by the express words of the statute, a legal seisin is executed in *cestui que use* in remainder, "of the like estate as he had in the use." Accordingly, it is laid down by Lord *Hobart*, in his elaborate judgment in *Dun-*

laid down that any person who is tenant in tail in possession may levy a fine which will discontinue the

combe v. Wingfield, Hob. 955, that "the first taker is to be understood, of the first taker of every several estate, as well in remainder as in possession." And see *Rogner v. Rogner*, Dyer, 77 b.

It is however to be observed, that although the estate for life, limited to *Thomas*, the nephew, by the will of his uncle, *Edward*, was executed in him as a first taker, yet being a vested remainder, it was so executed immediately upon the death of *Edward*; whereas his right to the second estate tail, limited by the settlement of 1708, did not descend to him till the death of his father *Thomas*. The statute of uses had therefore had its full operation, and had vested a legal estate in him before the right descended. This, it seems, would create a remitter. In the *Earl of Arundel and Lord Dacre's case*, 1 Leon. 91, it is said, that "if tenant in tail maketh a feoffment in fee to the use of himself for life, the remainder in tail to his eldest son, inheritable to the first entail, notwithstanding the eldest son takes his remainder by the statute, and so be in by force thereof, yet, when by the death of his father the right of the entail descends to him, he is remitted."

Upon a conveyance by lease (i. e. a bargain and sale for a year), and release to an infant, or to a feme covert, the statutory operation of the conveyance, *quoad* the bargain and sale, will not prevent a remitter. If *A.* bargain and sell land for a year to *B.*, an infant, who has an elder title, the

term is executed in *B.* by the statute, and he has acquired a legal estate in the term capable of being enlarged by release or by other common law conveyance. Having, in addition to his ancient right, a legal term in possession, the effect of the release is, without the assistance of the statute of uses, to enlarge the legal estate of *B.* in possession to the extent of *A.*'s interest. If therefore *A.*'s estate be a freehold, and if by reason of *B.*'s infancy or coverture that estate be cast upon *B.* without any folly or default chargeable upon *B.* the remitter will take effect, as it would have done upon a feoffment to such infant or feme covert.

A release, whether following a bargain and sale, or a particular estate created at common law, may indeed be so framed as to prevent the remitter. As where *A.*, the bargainer, releases to *B.*, the bargainee, to the use of *C.* a stranger. If the elder title be in *B.* there will be no remitter, because he is only seised for an instant; and if in *C.*, *C.* will not be remitted, because he is to take the legal estate in the same plight, i. e. by the above construction of the statute of uses, as completely denuded of the benefit of remitter, as he would have taken in the use for which this legal estate is substituted.

Upon the question, whether uses expressed in wills take effect under the statute of uses or under the statute of wills, great doubts appear to have been entertained. (See Butl. Co. Litt. 371 b. note 231, III. 5; 1 Sand. Uses, 195;

1832.

Dox
v.
Fitch.

Where no
remitter
upon lease
and release.

Whether uses
in wills op-
erate by statute
of uses.

Remitter,
by the de-
scend of the
right upon a
party who
has previous-
ly taken a
defeasible
estate of
freehold.

Where re-
mitter upon
lease and
release.

1832.

Doe

v.

FINCH.

remainder and reversion. What is meant, therefore, by a tenant in tail in possession? It seems to me that the

Sugd. Powers, 4th ed. 135.) The better opinion seems to be, that devises take effect by the sole and exclusive operation of the statute of wills, and that the legal estate passes immediately from the deviser to those whom, by an intention legally expressed in his will, he has designated as the parties to take the estate. The statute of wills not having passed until five years after the statute of uses, every deviser must be presumed to know, that where *A.* takes an estate to the use of *B.*, the legal estate vests in *B.* Where a devise is made to *A.*, to the use of *B.*, it is therefore an inference of law that the intention of the deviser was, that *B.* should have the legal estate. This, therefore, is a legal disposition within the statute of wills, in favour of *B.*, which, by the unaided force of that statute, vests the estate in *B.*

In ordinary cases it would be immaterial whether the estate so devised vested in *B.* by force of the statute of wills alone, or by the conjoint operation of that statute and of the statute of uses. But supposing *A.* to die in the lifetime of the deviser, the devise would lapse if *B.* could not take without the aid of the statute of uses, inasmuch as there would be no seisin to serve the use. In such a case it is admitted (Sugd. Pow. 4th ed. 138, 139) that *B.* would take without the aid of the statute of uses, by virtue of the intention, to which the statute of wills is competent to give effect; but the intention of the deviser as to the estate to be taken by *B.*

must be *the same* whether *A.* survive or not. And see 11 East, 548, 551, n.

A second case in which the distinction might be material, is where *B.*, to whose use the devise is made, having an elder title, it becomes a question whether he is remitted to the estate in respect of which he has, under such elder title, a right of entry or a right of action. This point, supposing both titles to have descended together, would have arisen in the principal case, in which, however, it does not appear whether at the time of the death of *Edward* in 1774, *Thomas*, the nephew, who lived till 1830, was of full age.

The distinction might also be material in considering a devise to *A.* to the use of *B.* in trust for *C.* The statute of uses, narrowed by the determination of the Judges in the reigns of *Edward* 6. and *Philip and Mary*, or rather by the subsequent general application of that which was then determined with reference to particular circumstances, can carry the legal estate no further than *B.*; whereas if the devise operate solely by the statute of wills, it might be a question whether the intention would not vest the estate in *C.*, clothing him, by force of the devise, with an immediate legal seisin upon the death of the deviser.

It was held by the court of C. P., in *Hore v. Dix*, 1 Sid. 26, and by the court of K. B. in *Foster v. Foster*, ib. 82, that no use can be created except by deed; the ground of which decision, in

Remitter of devisee.

Devise to *A.*, to the use of *B.*, in trust for *C.*

Use created by deed only.

Death of devisee to uses, in lifetime of deviser.

fallacy of the argument for the defendants lies in the word "possession." When a man is said to be tenant in tail in possession, it is not meant that there is no lease for years, or any thing of that sort, but that he is tenant in tail *in possession of the immediate estate of freehold*, there being no prior estate of freehold, as distinguished from tenant in remainder, after a prior estate of freehold. But a distinction has been drawn between an estate for years created by the settlor, and an estate for years created by the tenant in tail himself, because, as I suppose, the extreme difficulty was felt of saying, how far the argument would go, if it were contended that a tenant in tail in possession, having demised to a person who was to work the land for 21 years, was thereby prevented from levying a fine, and barring the remainder. No authority is produced for that distinction; no book alludes to it (87). What would be said in a case of this kind—land is limited to *A.* for life, remainder to *B.* for life, remainder in tail, with a power of leasing given to the tenant for life, who executes the power and dies; is it to be said that the lease would prevent the tenant in tail from levying a fine (88)? Again, it is said that an estate tail, after an estate for years, is a remainder. Now I deny that as a general proposition; because

1832.
Doe
v.
Finch,

the case of a mere voluntary use, appears, from what is said in *Sharlington v. Stratton*, Plowd. 308, 309, to be, that without a deed, which imports consideration, there is no sufficient consideration to raise the use. Those who in *Sharlington v. Stratton* argued against this position as too general, did not deny the necessity of a consideration, but merely contended that blood was a sufficient consideration to raise a use without deed. This may be said to be one of those exceptions *quæ probant regulam de non exceptis*.

(87) If the principle of the de-

fendants' argument were admitted, the distinction in question would seem to be a necessary result.

(88) As the termor would be in Term, created of the seisin created to serve the uses, of which the power was one, and would not hold under the tenant for life who happened to be the donee of that power, the case here put seems not only to be undistinguishable from, but to be identical with, the principal case, except that in the latter the term is created *expressly* by the settlor, without the intervention of a delegated appointor.

1882.

Dox
v.
FINCH.

although the passage cited from Co. Litt. uses the word "remainder," and although if an estate for years be granted to *A.* and then another estate to *B.*, to commence at the end of the first estate, the latter estate is in one sense a remainder, inasmuch as *B.* is not entitled to the immediate possession until the first estate be determined, yet it is not a remainder in the sense in which that term applies to tenants in tail. Was it ever held that, if an estate for years be limited to *A.*, with a limitation over to *B.* for life, or in fee, *B.* would not take an immediate estate of freehold? It has been repeatedly held that he would. Thus, in *Berrington v. Parkhurst* (89), where an estate was limited to *A.* for a term of 99 years, remainder to trustees to preserve, remainder to the first and other sons of *A.* in tail, it was held that a recovery suffered by *A.* and his son, without the concurrence of the trustees in making a tenant to the præcipe, was void—why? because the trustees had the immediate freehold. I can find no authority for saying that an estate for a term of years prevents a man who has the immediate tenancy in tail, and the immediate interest in the freehold, from levying a fine. If so, the effect of the fine must surely be the same in all cases. It is said that this is not so, because there can be no tortious alienation during the lawful possession of the termor for years. If by that we are to understand that there can be no tortious alienation, so as to destroy the term, that may be so (90). The cases

(89) 2 Stra. 1086; 4 Brown's Parl. Cases, 2d ed. 85; 13 East, 189.


(90) The difficulty seemed to lie in holding the remainder and reversion expectant upon the term to be destroyed, while the term itself continued. The argument for the defendants (*suprà*, 154,) admits the ordinary operation of the fine in barring the issue in tail by the express provision of 32 Hen. 8, c. 36, by which the enactment of

the statute *de donis*, that a fine levied by tenant in tail shall be null and void, is *pro tanto*, i.e. *quoad* the exclusion of the issue in tail, and *pro tanto* only, repealed.

Lord Coke says (1 Inst. 397 b), "There is a diversity between an alienation working by discontinuance of an estate which taketh away an entry, and an alienation working the divesting or displacing of estates which taketh away no entry. As if there be tenant for

Distinction between discontinuance and simple divesting.

cited for the defendants upon this point have all gone on that distinction, the question in those cases being whether

1832.

 DOE
 v.
 FINCH.

life, the remainder to *A.* in tail, the remainder to *B.* in fee, if tenant for life doth alien in fee this doth divest and displace the remainders, but worketh no discontinuance. And therein it is to be observed, that to every discontinuance there is necessary a divesting or displacing of the estate, and turning the same to a right: for if it be not turned to a right, they that have the estate cannot be driven to an action. And that is the reason that such inheritances as lie in grant cannot by grant be discontinued, because such a grant divesteth no estate, but passeth only that which he may lawfully grant, and so the estate itself doth descend, revert, or remain."

From the decision in the principal case it seems to follow, that if *Edward Allen* had been tenant for life only, with remainder to his brother *Thomas* in tail, the fine of *Edward* would have divested the remainder in tail, and would after five years passed have barred *Thomas*, the brother, and his issue by non-claim. *Tamen quere; et vide supra*, 140, note (21).

As to the distinction between the discontinuance, by feoffment or fine, of an estate tail, and the bar, by fine, of the descent to the issue in tail, *vide* Co. Litt. 372; *Archer's case*, 3 Co. Rep. 90; *Hunt v. King*, Cro. Eliz. 610;

supra, 156, note (59); and see *Doe d. Thomas v. Jones*, 1 Crompton and Jerv. 528, where in the lifetime of *A.*, tenant in tail, *B.*, his son and heir in tail, levied a fine with warranty, but without proclamations (*a*). *B.* survived *A.*, and died leaving *C.*, his son, and heir in tail. It was held, that the entry of *C.* was taken away by the warranty, *though without assets*. Whatever may be thought of the effect of a lineal warranty as binding the issue in tail *without assets*, it seems to be clear, that the entry of a party to whom a subsequent estate is limited *as a purchaser*, would be barred by the descent of a warranty, whether lineal or collateral, and whether with or without assets. In the principal case, *Thomas Allen*, the brother, claiming as the purchaser of an estate tail, and *Thomas*, the nephew, claiming through him, under the settlement of 1708, would be barred of their entry under the second remainder in tail created by that settlement, through the operation of the warranty contained in the fine of *Edward*, reducing the question to this—whether the *right* to the reversion was extinguished by the fine, or whether such right eventually descended to the heirs of *Thomas Allen* the settlor, to be asserted by a writ of formedon in the descender. (*Butler*, Co. Litt. 373, note 328.)

(*a*) No fines are now levied without proclamations (*supra*, 155, note (57)); but in *Doe d. Thomas v. Jones*, as the proclamations had been omitted to be proved at the trial, the case was treated as if none had been made. The judgment did not, however, turn upon this omission.

1839.

 DOE
 v.
 FINCH.

the fine destroyed the term. Now, if the fine had been void altogether by reason of the term, no such question would have arisen. There would have been no question whether it operated to destroy the term, for it would have no operation at all, according to the argument for the defendants (91). This fine, therefore, having been levied by tenant in tail in possession of the immediate interest of the freehold, worked a discontinuance, and gained a tortious fee; and the lessor of the plaintiff who claims under the will of the person by whom that fee was acquired, is entitled to recover.

Judgment for the plaintiff (92).

The special case having been reserved, with liberty to

(91) The question whether a person is competent, in point of *estate*, to make by *lawful* conveyance, a good tenant to the freehold in a common recovery, seems to be distinguishable from the question whether a person is competent, in point of *possession*, to gain the fee simple by a *wrongful* alienation.

Ouster of tenant for years.

(92) *A.*, lessee for years, remainder to *B.* in tail; *B.* enters upon *A.* and makes a lease for life or feoffment in fee; this is a discontinuance; for *B.* was seised by force of the intail at the time of the feoffment. *Sir Kenelm Digby v. Jorden*, in a trial at bar, 1 Roll. Abr. 634.

So, if *B.*, tenant in tail, *demises* to *A.* for years, and afterwards makes a deed of feoffment, with a letter of attorney, to *C.*, to make livery, and *C.* enters upon and ousts *A.* *Anon.* 10 Eliz., Sir Frn. Moore, 91, pl. 226; *Anon.* 20 Eliz., Dyer, 363.

So, although the ousted lessee re-enters after the feoffment. *Batley*

v. Trevillion, Sir Fra. Moore, 281, 6th resolution.

In all these three cases the ouster of the lessee would be unnecessary to create the discontinuance, and might be rejected as a circumstance wholly immaterial, according to the position laid down by Lord Coke in 1 Inst. 332 *b*, (*ante*, 135, 136); which position is carried still further, and extended to terms for years *not created by tenant in tail*, in an opinion thrown out in the case of *Sir George Reynell v. —*, at nisi prius, 1 Roll. Rep. 188, where the case was this: "Tenant for life, upon condition upon a certain act done, to have for years; the remainder in tail. Lessee does the act, whereupon he becomes tenant for years. Afterwards he in remainder levies a fine; and the question was, whether this is a discontinuance; and Coke, C. J. said, that he at first intended to have a special verdict; but afterwards the case was

either party to turn the same into a special verdict, *if the Court should think fit* (93),

1832.

DOE

v.

FINCH.

W. Hayes, for the defendants, now applied to the Court for leave for the defendants to avail themselves of this option, if they should be so advised.

Leave granted.

clear upon another matter. But it seems that it is a discontinuance, the fine being levied after he was lessee for years; otherwise if it had been during the time he was tenant for life."

This report, of which the above is a literal translation, is merely a short note of a nisi prius case. It appears doubtful whether the concluding observation is to be considered as a statement of the opinion of the reporter (Rolle), or whether it is to be understood as presenting the point which Lord *Coke* in-

tended to raise by the special verdict.

And see Com. Dig. Discontinuance, C. 4.

(93) Even where the words in italics are omitted, the leave of the Court must be obtained in order to authorize the turning of a special case into a special verdict. Where therefore the power of resorting to a court of error is considered as of paramount importance, the safer course appears to be to take a special verdict in the first instance.

1832.

RUBERY v. STEVENS and another.

The executors of a lessee are chargeable personally, as assigns, for such part of the rent as the occupation of the premises is worth; but, if they do not enter, they are suable only in the detinet, in respect of any excess of the rent above the value.

COVENANT for rent of a house in Stepney, in the county of Middlesex, brought by the plaintiff, as legatee of the reversion, against the defendants, as assigns of a term for years therein. The declaration alleged, that *John Rubery* (the testator) was possessed of a certain dwelling-house in the parish of Stepney, Middlesex, for the residue of a term of years, commencing in 1795; and by indenture of 24th October, 1805, demised to *Adams* the same for a term of 31 years, at the yearly rent of 26*l.*; and that *Adams* covenanted with *John Rubery* to pay the rent. That *Adams* entered and became possessed for the said term. That on the 1st of January, 1828, the term of years of *Adams* in the premises, by assignment, vested in the defendants, who accordingly entered and became possessed. That *John Rubery*, by his will, bequeathed the reversion of his term in the premises to the plaintiff; and that the executors proved the will, and afterwards assented to the bequest of the reversion. Breach: that on the 29th day of September, 1830, 52*l.* of the rent aforesaid, for two years of the said term, ending that day, was due from the defendants to the plaintiff, and that the same was unpaid. Plea: that defendants ought not to be charged with the payment of the rent, otherwise than as executors of the will of *Peter Walker*, deceased, *in the detinet only*, because after the making of the lease, and whilst *Adams* was possessed of the premises by virtue thereof, on the 3d of December, 1826, by a deed-poll, *Adams* assigned the premises to *Pulley* for the residue of the term of 31 years. By virtue whereof said *Pulley* entered upon &c., and being so possessed, made his will, bearing date the 1st of April, 1812, and appointed *William Pulley* and *William Mills Pulley* executors thereof, and died. That the two executors of *Pulley* proved the will, and afterwards, on the 11th of September, 1813, by indenture, assigned the dwelling-house, for the residue of the term

1832.


 RUBERY
 v.
 STEVENS.

therein, to *P. Walker*. By virtue of which indenture *P. Walker* entered upon &c. And *P. Walker*, being so possessed, on the 16th day of February, 1826, made his will, and appointed the defendants and one *J. Evans* executors thereof. After his death the defendants proved the will. The plea then proceeded as follows: " And the said defendants further say, that all the estate, right, title, interest and term for years, of the said *William Godfrey Adams*, of, in, and to the said demised premises, with the appurtenances, so in the said declaration alleged to have vested in the said defendants by assignment thereof, did so vest in them as executors of the last will and testament of the said *Peter Walker*, as aforesaid, and not otherwise. And the said defendants further say, that the said demised premises with the appurtenances at the time of the death of the said *Peter Walker* were, and from thence hitherto have been and still are of much less yearly value than the amount of the said rent of 26*l.* a year, so by the said indenture in the said declaration mentioned as reserved as aforesaid; that is to say, the same premises during all the time aforesaid were and still are of no value whatever. And the said defendants further say, that they the said defendants have fully administered all and singular the goods and chattels which were of the said *P. Walker*, deceased, at the time of his death, and which have ever come to the hands of the said defendants as executors as aforesaid, to be administered, to wit, at Westminster aforesaid, in the county aforesaid; And that they the said defendants have not, nor on the day of the exhibiting of the bill of the said plaintiff in this behalf had, nor at any time since, have had any goods or chattels which were of the said *P. Walker*, deceased, at the time of his death, in the hands of them the said defendants, as executors as aforesaid, to be administered; And this they the said defendants are ready to verify: wherefore they pray judgment, if they the said defendants ought to be charged with the said rent so reserved by the said

1832.

 RUBERY
 v.
 STEVENS.

indenture as aforesaid otherwise than as executors of the last will and testament of the said *P. Walker* as aforesaid, *in the detinet only*," &c. Replication: "that the said demised premises, with the appurtenances, at the time of the death of the said *P. Walker*, were and from thence hitherto have been and still *are of the yearly value of 26l.*; and this the said plaintiff prays, &c. Upon this issue was joined. The cause came on to be tried at the sittings after Hilary term in 1832, before Lord *Tenterden*, C. J. In the course of the trial the learned judge intimated an opinion that the plea was bad, as it affirmed that the dwelling-house was of no yearly value whatever; but he left the question of value to the jury, who found the yearly value of the dwelling-house to be 20*l.*, and returned a verdict for the plaintiff. Leave was given to the defendants to move to enter a nonsuit. In Easter term last *Campbell* accordingly obtained a rule nisi to enter a nonsuit, against which

Sir *J. Scarlett* and *Cottingham* now shewed cause. The replication in this case is good after verdict. The statement that the premises were of the value of 26*l.* is an immaterial allegation. The real question upon the pleadings is, whether the premises are of *any* value; 1 *Wms. Saund.* 111, 390. *Cobb v. Bryan* (a), *Wilbeam v. Ashton* (b).

Campbell and *Addison* in support of the rule. The assigns may discharge themselves from liability, as they have done by this plea. When the land is of no value, executors can only be sued in the detinet. The plea would be good without any statement of the value; *Holling v. Cannon* (c), *Gillinghurst v. Spearman* (d).

Cur. adv. vult.

(a) 3 Bos. & Pul. 348.

(b) 1 Campb. 78.


(c) Pollerf. 59.

(d) 1 Salk. 297.

DENMAN, C. J. now delivered the judgment of the Court.

There are two questions in this case:

First, Whether the substance of this plea is, that the tenements demised were *not of the value of the rent*, or that they were of *no value whatever*. Secondly, Whether, if the latter be the substance of the plea, the plaintiff is entitled to judgment on this issue upon the facts found by the jury.

1832.

 RUBERY
 v.
 STEVENS.
 First point—
 Substance of
 plea.
 Second point
 —Effect of
 replication.

Upon referring to the authorities and considering the case, we are of opinion that the plaintiff upon these pleadings is entitled to a verdict. The executor of a termor cannot waive a term, but must either renounce or accept the executorship *in toto*, and if he accept the executorship and enters on the demised premises, he is chargeable as assignee in an action of debt or covenant, for the arrears of rent due after his entry, *de bonis propriis*. But as the rent may be of greater value than the land, it would be a hardship upon the executor in that case to charge him personally in his own right with the full amount of the rent; and, from the authorities, it is clear that he is not so chargeable. But then arises the question, whether he is *personally liable* in that event as assignee, for no part of the rent, considering it as an *entire thing* for the whole of which he must be so liable or not at all; or whether the rent can be apportioned and he is liable in the character of assignee for so much of the rent as the premises are worth. Upon reference to the authorities, it seems that the rent is in this case to be apportioned, and that the executor is chargeable personally for so much of the rent as the premises are worth. In one of the earliest cases, *Hargreave's case* (a), it was adjudged, "that in an action against the executor for rent due in his own time, the writ should be in the debet and detinet; for instance, an executor takes the profits, nothing shall be assets but the profits above the rent; as if the land be worth 10*l.* per annum and 5*l.* is reserved, in that case nothing shall be

First point.

(a) 5 Co. Rep. 31 b.

1832.

 RUBERY
 v.
 STEVENS.


assets but the 5*l.* beyond the rent." The next material case is that of *Hillier v. Casbert*, reported in several books. In 1 *Lev.* 127, Kelynge says "the executor cannot waive the term, but shall be charged in the detinet, on which the assets shall come in question, and if he continues in possession, he shall be so charged in the debet and detinet *in respect of the perception of the profits*, whether he has assets or not," to which Twysden agreed. In the same case(a) it is stated, that it was resolved by all, that an executor cannot waive, if he does not waive the executorship; and even where the testator took a demise of land, which is worth only 10*l.* a year, rendering 20*l.* a year, this contract binds the executor as long as he has assets. But per *Windham, J.*, it seems to be, "that if an action in this case is brought in the debet and detinet, and the executor pleads nil debet, and in the evidence it appears that the land is worth only 10*l.* a year, he shall have a verdict for 10*l.* a year, and for the other 10*l.* the lessor shall have an action in the detinet tantum, because he is solely liable in respect of the contract." The reporter adds a query. There is an argument of *Pollexfen* when at the bar, in his Reports, p. 132, which places this question in a clear point of view; he says, "If it should be admitted that in such case where the rent is more than the value of the land, in an action of the debet and detinet, the defendant shall not be charged for the whole rent, yet he ought to be charged for so much as the land is worth. This I ground upon what has been said, that if an action in the debet and detinet lie where the land is of as much value as the rent, it ought then to be for *as much of the rent as the value of the land amounts unto* in the debet and detinet; then if so, their plea is pleaded as a bar to the whole rent, (*viz.*) to the 60*l.* over and besides the value. As for the 100*l.*, by his own shewing we ought to recover, for by his own shewing he is chargeable in the debet and detinet for that. In debt for rent, the defendant pleads an eviction of part of the land, and sets out the value; this is only a bar to a part

of the rent, and if he pleads nothing to the rest, judgment must be against him for the whole."

In the case of *Backley v. Peck* (a), C. J. Parker (b) says, "if the rent be of less value than the land, law, *prima facie*, supposes so much of the profits as suffices to make up the rent as appropriated to the lessor, and cannot be applied to any thing else. On the other hand, if the rent be worth more than the land, the defendant may disclose that by special pleading, and pray judgment whether he shall be charged otherwise than in the detinet only."

The dictum of Windham and the argument of Pollexfen appear to us to be well founded in law; for if the profits are appropriated to the lessor and become a personal debt due from the executors to him, when they are equal to or greater than the value of the rent, why should they not be equally appropriated to the lessor, as equally a *personal debt* due from the executor, when they are less? If this be the rule of law, the plea in this case, which is pleaded to the whole rent in the declaration, cannot be a good bar, unless it shew that there were no profits at all. If the profits had been less than the rent, and had therefore covered a part only of the demand, that part should have been confessed and a plea should have been pleaded to the remainder. The substance of the plea must therefore be taken to be, that the demised messuage was of no value whatever.

The second question, whether upon the form of the issue the plaintiff is entitled to judgment. The jury have found the demised tenements to be worth 20*l.* a year only. The substance of the plea being, that the demised premises were of no value, we think that the substance of the replication is, that they were of some value, and that the issue joined thereon is merely informal and cured by verdict. Looking at the allegations on both sides, we find an averment by the plaintiff that the demised premises are of the yearly value of 26*l.*, and on the part of the defendant, that they are of much less value than 26*l.*, that is to say, of no

1832.

 RUBYRY
 v.
 STEVENS.

(a) 3 Salk. 317.

(b) Afterwards Lord Keeper Macclesfield.

1832.

RUBERY
v.
STEVENS.

value whatever, which is equivalent in substance to an allegation that they are not of the value of 26*l.* or any part thereof. We therefore think that the substance of the issue is, whether the demised tenements were worth any thing, and that this issue ought, on the facts, to be found for the plaintiff. If they are of any value whatever the plea is falsified; for it constitutes no defence to the action for the whole rent, unless they are of no value.

Rule discharged.

WRAY, Assignee of CALTON, an Insolvent Debtor,
v. The EARL of EGREMONT (a).

A landlord, who has distrained the goods of a tenant who, being arrested after the distress, goes to gaol, and petitions the Insolvent Debtors' Court before the goods are sold, is entitled to the whole of the rent due, and is not restricted to one year's rent.

THIS cause came on for trial at the York Summer Assizes for 1832, before *Parke, J.*, when the following facts appeared:—

Calton was tenant to the Earl of *Egremont* at a rent of 115*l.* 14*s.* a year. At Lady day, 1831, the sum of 278*l.* 14*s.* was due from *Calton* to the Earl, as arrears of rent. On the 29th August, 1831, the Earl distrained the goods of *Calton* for 278*l.* 10*s.*, and notice of the distress having been made was given to *Calton* the same day. On the following day (the 30th of August) *Calton* was arrested for debt, and went to gaol, and on the same day signed a petition to the Insolvent Debtors' Court to have the benefit of the insolvent act.

On the 3d of September, notice was given by *Calton* to the Earl that he intended to take the benefit of the insolvent act.

On the 5th of September the Earl sold the goods distrained, which produced 200*l.* 17*s.*, being 74*l.* more than one year's rent of the farm held by *Calton*.

For the recovery of this sum of 74*l.* the action was

(a) This case was moved before *Denman, C. J.* took his seat.

brought. The facts were admitted. The learned judge directed the plaintiff to be nonsuited, being of opinion that the defendant had a right to retain the whole of the money levied under the distress.

1832.

 WRAY
 v.
 Earl of
 EGREMONT.

Campbell now moved to set aside the nonsuit and for a new trial, on the ground of misdirection. The 31st section of the 7 Geo. 4, c. 57, (the insolvent act), enacts "that no distress or distresses made and levied after the arrest or other commencement of the imprisonment of any person who shall petition the said court for his or her discharge from such imprisonment, according to this act, upon the goods or effects of any such person, shall be available for more than one year's rent accrued prior to the execution of the conveyance and assignment by such person, in pursuance of this act, but that the landlord or party to whom the rent shall be due shall and may be a creditor for the overplus of the rent due, and for which the distress shall not be available, and entitled to all the provisions made for creditors under this act" (a). It has been decided that where an execution issues against the goods of the tenant, the landlord shall not be entitled to more than one year's rent. In this case the distress was only made, not levied. A distress does not divest the property of the goods out of the tenant and transfer it to the landlord (b); the goods consequently were the tenant's until they were assigned by

(a) The 74th section of the 6 Geo. 4, c. 16, (the bankrupt act), is similar to this section of the insolvent act.

(b) As to the period at which the property is divested or bound by legal process, see *Rex v. Cotton*, Parker, 113; *Thurston v. Mills*, 16 East, 254. And see M. 19 H. 6, fo. 19, pl. 81; Callis on Sewers, 159 b; F. N. B. 78 P.; *Sheffield* and *Ratcliffe's* case, 2 Roll. Rep. 125; *Attorney-General v. Capel*,

2 Shower, 480; *Cooper v. Chitty*, 1 Burr. 36; *Bulter v. Bulter*, 1 East, 338; *Rex v. Alnutt*, 16 East, 278; S. C. 2 Wms. Saund. 70, e; *Rex v. Sloper*, MS. and 6 Price, 144, and Chit. Prerog. 289; *Swain v. Morland*, Gow, N. P. C. 390, 1 Bro. & Bingh. 370, and 3 B. Moore, 740; Com. Dig. title "Debt," G. 9; Gilb. Exch. 91, 92, 93; West's Extents, 154; Mann. Exch. Pract. 2d edit. 44.

1832.

 WRAY
 v.
 Earl of
 EGREMONT.

virtue of the insolvent debtors' act to the plaintiff, who therefore was entitled to recover.

PARKE, J.—The act of 7 *Geo.* 4, c. 57, does not apply to this case. The 31st section of that act was intended to prevent the landlord, after the defendant had been arrested and conveyed to prison, from seizing the insolvent's goods, and thereby gaining an undue advantage over the rest of the insolvent's creditors.

TAUNTON, J.—If the distress be made before the arrest, its progress need not be stayed because the tenant is afterwards taken to gaol. This is like an execution by the sheriff. If the sheriff seize the goods of a bankrupt before an act of bankruptcy has been committed, he may complete the execution by the sale of the goods afterwards (*a*).

PATTESON, J.—I do not think the word “levied” has a different meaning from the word “made.” Words of a similar description are to be found in the statute of 21 *Jac.* 1, c. 19. The 9th section of that statute enacts, that all creditors having security for their debts by judgment, “whereof there is no execution or extent *served and executed*, upon any the lands, &c. of the bankrupt, before he shall become bankrupt, shall not be relieved upon any such judgment for more than a ratable part of their debts.” It has been held that “served” and “executed” are in effect the same, and that if an execution has commenced before the act of bankruptcy, but is not finished until after the act has been committed, the execution is served and executed within the meaning of that section of the statute. The statute of *Anne* (*b*) has no application to this case, because;

(*a*) *Giles v. Grover*, 9 Bingham, 198; *Godson v. Sanctuary*, *ante*, 52. (sect. 1), “that no goods or chattels whatsoever, lying or being in or upon any messuages, lands or tenements, which are or shall be leased

(*b*) 8 *Anne*, c. 14, which enacts

by the provisions of that statute, the party at whose suit the execution issues is bound to pay the landlord of the premises one year's rent, although no distress has been made by him.

1832.

 WRAY
 v.
 Earl of
 EGREMONT.

Rule refused.

for life or lives, term of years, at will or otherwise, shall be liable to be taken under any execution on any pretence whatsoever, unless the party at whose suit the execution is sued out shall, before the removal of such goods from off the said premises by virtue of such execution or extent, pay to the landlord of the said premises or his bailiff all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution, provided the said ar-

rears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party, at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment as he might have done before the making of this act; and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money."

ALIKEN v. HOWELL.

ASSUMPSIT by indorsee against acceptor of a bill of exchange drawn by *Bayard*. At the trial of the cause, *Bayard* gave evidence that the bill was accepted for a gambling consideration, and upon this evidence the bill was held void in the hands of a *bonâ fide* indorsee, and the jury gave their verdict for the defendant. *Campbell* obtained a rule nisi for a new trial upon the affidavits of five persons, stating that the bill upon which the action was brought was not given in respect of a gambling transaction. *Chamberlain*, who was an indorsee and indorser, and present at the trial, deposed that he had had conversations with *Bayard*, in which the latter acknowledged that the bill was not given in discharge of any gambling debt, and

In an action on a bill of exchange, after a verdict for the defendant, on the ground that the bill was drawn originally for a gambling debt, the Court will not grant a new trial upon affidavits negating such defence, where there has been no surprise upon the plea.

1832.

ALIKEN
v.
HOWELL.

suggested that *Bayard* might have given his evidence under a mistake as to the identity of the bill. The affidavit of *James* was to the same effect. These affidavits were contradicted by that of *Bayard* confirming the evidence which he had given at the trial.

F. Pollock now shewed cause. This rule was obtained upon affidavits alleging that *Bayard's* statement was untrue. There is no affidavit by plaintiff that he was taken by surprise; and if it had been so, that would have been no ground for granting a new trial to the plaintiff, who might, at any moment when he saw the evidence taking an unexpected turn, have withdrawn the case from the consideration of the jury. This application is made, not in respect of any thing which is alleged to have occurred before or at the trial, but merely on the ground that since the trial something has come out in conversation with *Bayard* or his agent, tending to contradict the evidence relative to the nature of the consideration given for the bill. If this rule be made absolute, the consequence will be that in actions of this sort *ex post facto* evidence may at any time be adduced as ground for granting a new trial. From the situation of the parties in this case rendering it probable that the consideration was a gambling debt, it appears that the plaintiff made inquiries of *Bayard* upon this point previously to the trial, and received for answer that the consideration was good; and at the trial questions were put to the witness with the view of obtaining a denial of the fact of the illegality of the consideration.

Campbell, S. G., in support of the rule. The plaintiff was proved to have been a *bonâ fide* indorsee. It is however admitted, that if the original consideration were a gambling debt, the bill would not be valid in the hands of a *bonâ fide* holder. But the defence is one that ought to be made out by the most satisfactory evidence; and if any doubt be thrown upon that evidence, it is sufficient to

invalidate it. Upon payment of the costs of the former trial, this matter ought again to be submitted to the consideration of a jury. There are other bills to a large amount, some of which may have been given for a gambling consideration; but that objection of course cannot be set up as a defence to all the bills. The verdict was given wholly upon the evidence of *Bayard*, who was much interested in proving that the bill was void.

1832.
ALIKEN
v.
HOWELL.

DENMAN, C. J.—We cannot alter the law (*a*). The parties were not taken by surprise, as it appears that they had heard sufficient to shake their credit in the testimony which Mr. *Bayard* had given them. There ought to be something very convincing for the Court, after this trial, to set aside the verdict. With regard to *Bayard* not being a creditable witness, by reason of his connection with the defendant rendering it his interest to avoid the bill, that is a circumstance of which the plaintiff had the full advantage in his address to the jury. It would be very dangerous to allow this rule of law to be infringed upon.

PARKE, J.—I am also of the same opinion. The rule of law is, that such transactions shall render bills void. This was proved at the trial; and no ground has been made out for granting a new trial.

TAUNTON, J.—I am entirely of the same opinion. If this rule were to be departed from, we should be inundated with motions for new trials upon similar affidavits.

PATTESON, J. concurred.

Rule discharged.

(*a*) By 58 Geo. 3, c. 93, bills drawn upon a *usurious* contract are made available in the hands of a holder for value, without no-

tice. But no such relaxation of the law has taken place with respect to bills drawn upon a *gambling* transaction.

1832.

The KING v. JOHN HEARLE TREMAYNE, Esq.

The owner of the soil granting a lease or set of a manganese mine, reserving a money render per ton of mineral raised, is not liable to be rated to the relief of the poor as an occupier.

Nor is the occupier of a manganese mine liable to be rated.

IN a rate made for the relief of the poor of the parish of Maristow, in the county of Devon, 15th September, 1831, Mr. *Tremayne* was assessed "for manganese dues," in the sum of 7*l.* 10*s.* Against this rate Mr. *Tremayne* appealed to the Court of Quarter Sessions, on the ground that he was not the occupier of any manganese dues in the parish, and also that he was not liable by law to be assessed in the rate for or in respect of any manganese dues. The Sessions confirmed the rate, subject to the opinion of this Court upon the following case :

Henry Hawkins Tremayne, clerk, the deceased father of the appellant, being tenant for life, with a power of granting leases and settlements of the lands hereinafter mentioned, did, by indenture bearing date the 23d October, 1816, and made between *H. H. Tremayne* of the one part, and *John Williams*, Esq. of the other part, give and grant unto *Williams*, his partners, fellow adventurers, executors, administrators, and assigns, full and free liberty, licence and authority, to dig, work, mine, and search for manganese, in and throughout all those tenements commonly known by the several names of Allerford, Sea Down, and Holster Yard, situate in the parish of Maristow; and the manganese there found to raise and bring to grass, and there to pick, dress, cleanse, and make merchantable and fit for sale, and the same to take and carry away, convert, and dispose of at his and their will and pleasure, and within the limits of the settlement thereby granted, to dig, make, and work such aqueducts, shafts, &c., and to erect such sheds, engines, and other buildings as he, *Williams*, his partners, &c. should from time to time think necessary or convenient for the more effectual exercise of the liberties, powers, and authorities thereby granted, together with the use of all such waters and watercourses running through or within the limits of the settlement thereby granted, as were not at

that time in grant to any other persons, with liberty to divert such waters and watercourses, and to cut any bats or channels for conducting the same through or over any part of the lands lying within the limits of the *settlement* thereby granted, for the purpose of more effectually and beneficially exercising and enjoying the liberties, &c. thereby granted, excepting unto the said *H. H. Tremayne*, his heirs and assigns, all other ores, &c. with full power and authority to and for the said *H. H. Tremayne*, his heirs or assigns, his, her, or their workmen and agents, into and upon any part of the same premises in any manner to search for, break, land, stamp, and dress the said last mentioned ores, &c. and from thence to take and carry away the same at his or their will or pleasure: To hold and enjoy the said several liberties, licences, &c. unto *Williams*, his partners, &c. from the 15th day of March then last, for the term of 21 years, yielding and paying therefore, unto the said *H. H. Tremayne*, his heirs or assigns, 1*l.* 15*s.* for every ton weight of manganese raised during the term, within the limits of the said *settlement*, once within the space of every year, during the term, free from all charges of raising, dressing, and cleansing the same, or otherwise incident to the prosecution of the said adventure. (Then followed provisions for weighing and accounting for the manganese).

H. H. Tremayne died on the 10th February, 1829, and the appellant succeeded him, and is now seised, as tenant for life, of the lands described in the said indenture, subject, as to part of the lands, to the said grant or *settlement*, and as to other part thereof subject also to the leases at rack rent hereinafter mentioned.

By virtue of the above grant or settlement, and within the limits thereby granted, *Williams*, with certain other persons, his partners and co-adventurers, have dug and sunk shafts, driven aqueducts and levels, and opened pits for the purpose of searching for and raising manganese. The same partners have also erected crushing machines worked by water wheels, for pulverizing the ore when

1832.
The KING
v.
TREMAYNE.

1832.

 The King
 v.
 TREMAYNE.

raised, and built houses and sheds for dressing and cleansing the same. The whole of these works were undertaken and performed at the sole risk and expense of *Williams*, his partners, &c. by their own labourers, and under the entire direction and superintendence of their own agents, and without any expense, risk, or interference whatsoever on the part of either *H. H. Tremayne* or the appellant, and the whole have continually been and still are in the exclusive possession and occupation of *Williams*, his partners, &c. Considerable quantities of manganese have been raised by *Williams*, his partners, &c. the whole of which, after undergoing the several processes of pulverizing, dressing, and cleansing, at a great expense, have been sold and disposed of by them as they thought fit. *Williams* and his co-adventurers regularly accounted with *H. H. Tremayne* in his life-time, and have since his death accounted with the appellant, for the 1*l.* 15*s.* per ton reserved by the indenture; and the assessment now appealed against is made in respect of the money payments made to the appellant by *Williams* and his co-adventurers. The tenements and farms of Allerford and Sea Down, part of the lands comprised within the limits of the above settlement, are occupied by tenants at rack rent, subject to a reservation of mines, ores, metals, and minerals, with the usual powers of digging and searching, and those tenants are respectively assessed to the poor-rates of the parish, in respect of such occupations, proportionably with the other occupiers; and the tenement and farm of Holster Yard, and the residue of the lands within the same limits, are in the occupation of the appellant, who, in the rate appealed against, is assessed in respect of such occupation. The appellant is also assessed therein, thus:—"For manganese dues, 7*l.* 10*s.*"

The question for the opinion of the Court is, whether the appellant is duly rated for the manganese mines, as an occupier, in the parish of Maristow.

F. Kelly and *Escott* in support of the order of sessions.

The question in this case is, whether the receipt of rent arising from a mine, and proportionate to the quantity of metal obtained, is an occupation of land, so as to render the receiver liable to poor-rates. The case resolves itself into two questions: first, whether any interest in the land passed out of *H. H. Tremayne* to the adventurers who worked the mine; and secondly, whether by the receipt of 1*l.* 15*s.* for every ton of metal obtained, the appellant is not an occupier of the land, and as such liable to be rated. As to the first question, this was a mere grant of a *licence* to dig for ore. It is not a demise of land, as there are no words of demise, *Doe v. Wood* (a). *H. H. Tremayne* was seised in fee of the land before the mine was opened. No interest passed by the lease. The appellant must have been therefore seised of the freehold of the mine when the rate was made, *The King v. St. Austell* (b), *The King v. Bishop of Rochester* (c). With respect to the latter question, in all the previous cases the rent was not paid in proportion to the ore obtained, *Rowls v. Gells and another* (d), *Rex v. Baptist Mill Company* (e). The cases of *Rex v. Earl of Pomfret* (f) and *Rex v. Bishop of Rochester* are distinguishable from the present case. In *Rex v. Earl of Pomfret*, the Court said that the reservation was a rent, and the parties were put by the lease unequivocally in the character of landlord and tenant. This resembles the case of tolls; and it should be recollected that here there cannot be a double rating.

1832:
The King
v.
TREMAYNE.

Licence to dig
for ore.

Crowder, contra, was stopped by the Court.

DENMAN, C. J.—It is clear that the landlord is not the occupier of the soil of the mine. In *The King v. St. Austell*, the landlord was paid in ore in lieu of money. There was

(a) 1 B. & A. 518.

(b) 5 B. & A. 693; 1 D. & R. 351.

(c) 12 East, 353.

(d) Cowper, 512.

(e) 1 M. & S. 612.

(f) 5 M. & S. 139.

1882.

The King

v.

TREMAYNE.

in this case no occupation of land by the appellant. The Court entertains no doubt upon the case.

Coal-mines.

PARKE, J.—This is a very clear case, and it falls within the case of *The King v. Pomfret*, from which it has been endeavoured to be distinguished. But even supposing that the lessees were not in occupation of the mine, and that the appellant himself occupied it, he would not be liable to be assessed to the relief of the poor. The statute speaks only of *coal* mines; from which it has been inferred that no other mine is within the purview of the statute. As this is not a coal mine, the occupier is not liable to be rated in respect of it. The difference between this case and those which have been cited is, that the lessor here does not continue in possession of the soil. In the case of *The King v. St. Austell*, the lessor received a portion of the mineral as rent.

Render of part
of the thing
demised.

Mines.

TAUNTON, J.—I concur in what has fallen from my lord and my brother Parke. The distinction is refused; but the cases may be reconciled by distinguishing between a reservation of rent and a render of part of the thing demised(a). Now here there is a pecuniary rent reserved, and not a render of mineral. Again, if the appellant is to be considered as the occupier of the soil of the mine, and the lessees as merely his agents, he is not liable to be rated, as coal mines are the only mines which are ratable.

PATTESON, J.—I am entirely of the same opinion. The rule has been extremely clearly laid down in *The King v. Baptist-Mill Company*. It is there said, "when a person receives, without risk, part of the produce extracted from the bowels of the earth, he is an occupier of land; but where he merely receives a rent, or money payment, there the Court has held, as in *Rex v. Bishop of Rochester*, that

(a) See *Campbell v. Leach*, Ambler, 740; *Buckley v. Kenyon*, 10 East, 139; Co. Lit. 47 a.

he is not an occupier." Mr. *Tremayne* cannot be rated as an occupier of a mine.

Order of Session quashed.

1839.

The KING
v.
TREMAYNE.

The KING v. The Inhabitants of CONINGSBY.

BY an order of two magistrates, *Elizabeth Flintham* was removed from the parish of Coningsby to the parish of Stickney, both in the county of Lincoln. Upon appeal to the quarter sessions the order was quashed, subject to the opinion of this Court upon the following case:—

A few days before May-day, 1829, the pauper was hired by Mr. *Gosling*, of Stickney, to serve him for a year from May-day, at the wages of *3*l.* 10*s.**; and on May-day she entered her master's service. About four months afterwards she was apprehended, upon the complaint of a neighbour, on a charge of having wilfully and maliciously damaged property belonging to him; and the magistrates before whom she was brought imposed upon her a fine. This fine not being paid, the pauper was committed to prison for one month. It was by the advice of her mistress, who was present at the hearing of the complaint, that the pauper went to prison instead of paying the fine. When she was taken to prison her mistress told her that she was to return when her time would be out; and she sent her provisions occasionally during her imprisonment. At the end of the month the pauper returned immediately to her master's, and went about her work as usual. She stayed in the service till May-day, 1830, and on leaving it received her whole wages without any deduction.

The question for the Court of King's Bench is, whether under these circumstances the pauper gained a settlement by hiring and service in the parish of Stickney.

Hildyard, in support of the order of sessions. The question is, whether there was in this case a constructive

A servant being hired for a year, her actual service is interrupted by her imprisonment for a misdemeanor, but the master directs her to return when discharged, and afterwards receives her back into his service, and pays her wages for the entire year, without making any deduction for the period of detention in prison:—This is a dispensation with the service, and a settlement is gained.

So, although the sentence gives an option to the servant of paying a fine or suffering the imprisonment, and the master assents to her taking the latter course, and afterwards receives her back into his service and pays her for the whole year.

1892.

 The KING
 v.
 COWINGSBY:

service by the pauper during the period of her confinement in gaol. The cases of *The King v. Westmeon* (a) and *The King v. North Cray* (b), are decisive to shew that there was here no service for a year. On the other side, the cases of *The King v. Barton-upon-Irwell* (c) and of *The King v. Hallow* (d), will be relied on; but those cases are distinguishable from the present, because in them actual service could have been performed by the pauper. No case can be found in which there being, under the circumstances, no possibility of the pauper's performing any service, a dispensation by the master was held to make a constructive service. In the case now before the Court, the absence of the pauper is not voluntary either on the part of the mistress or of the servant. The conduct of the mistress does not operate to make the absence permissive, because the servant was obliged either to pay the fine or go to prison; and if it was really more advantageous to her to do the latter, the mistress only did her duty in advising her to pursue that course. The circumstance of there being an alternative does not make the going to gaol voluntary on the part of the servant; for if she had brought an action of false imprisonment against the person who detained her, it would have been no answer to say, "the imprisonment was not compulsory, inasmuch as you went at your own option, instead of paying the fine;" *Rex v. St. Peter of Mancroft* (e), *Rex v. Maidstone* (f). In the Militia Act (g) it is expressly provided, that persons serving in the militia shall not by absence in such service be deprived of the settlement which they would otherwise have gained. The insertion of this provision shews what the legislature thought would in general be the effect of absence by legal coercion. The absence in this case is as involuntary as that of the militia man. The case resembles also that of an ordinary

Militia Act.

(a) 1 Cald. 129.

(b) Ibid. 495.

(c) 2 M. & S. 329.

(d) 4 Dowl. & Ryl. 299; S. C.

2 B. & C. 739.

(e) 8 T. R. 477.

(f) 12 East, 550.

(g) 43 Geo. 3, c. 111, s. 15.

soldier who is not *sui juris*, and therefore cannot perform any contract of service; *The King v. Taunton St. James (a)*.

1839.
The KING
v.
CONINGSBY.

Fynes Clinton contra. The pauper in this case went to prison not only with the assent, but by the express advice of her mistress, and therefore the absence must be considered as permissive. The subsequent conduct of the master in receiving her back into his service, and paying the whole of the wages agreed upon for the year's service, most strongly shews an intention to dispense with her service during the period of her imprisonment; *Rex v. Kenilworth (b)*. The case of *Rex v. Barton-upon-Irwell* is not distinguishable from that under discussion; but those of *Rex v. North Cray* and *Rex v. Westmeon*, are clearly so, the service having been in those cases incomplete.

DENMAN, C. J.—There was in this case no actual abiding in the service of the master during the whole of the year; but the mistress not only gave the pauper permission to go, but received her back again at the expiration of the period of her imprisonment. We must certainly infer that the servant was unable to pay the fine imposed upon her; but there was a clear dispensation with the service; and where the service is dispensed with by the master, it must be considered as a continuing service. *The King v. North Cray* and *The King v. Westmeon* are clearly distinguishable from the present case.

PARKE, J.—The head of constructive service has been introduced by necessity. Where the master pays the wages of the servant for a period, during which he has been absent, that is considered as a dispensation with the service. If a man were to be absent from illness, and his master afterwards received him back, that also would be a dispensation. *The King v. North Cray* and *The King v. Westmeon*, are clearly distinguishable from the present case.

(a) 4 M. & R. 695; S. C. 9 B. & C. 831. (b) 2 T. R. 598.

1832.
 The King
 v.
 CONINGSBY.

As to the Militia Act, the effect of it is merely to take from the master the option which he would otherwise have had of dismissing his servant.

TAUNTON, J.—The cases of *The King v. North Cray* and *The King v. Westmeon*, are distinguishable from the present case, because in those cases the masters did not receive the paupers back again. It is much to be regretted that the doctrine of dispensation has been pushed so far; and I yield in this case to authority, and not to reason.

PATTESON, J. concurred.

Order of Sessions quashed.

STOTHERT v. GOODFELLOW and DALLEY (a).

The breach of the condition of a bond, otherwise well assigned, is not vitiated by the superaddition of immaterial allegations.

DEBT upon bond, dated the 12th day of April, 1828, in the penalty of 100*l*. The bond was subject to the following condition:—"Whereas the above-named *Henry Stothert* hath appointed the said *Henry Goodfellow*, his agent, to sell for the said *H. S.* goods, &c. upon commission, and to account to the said *H. S.* for all such goods, &c. as he the said *H. G.* shall sell for or on account of the said *H. S.*: Now the condition of this obligation is such, that if the said *H. G.* do and shall at all times, and from time to time during the space of three years, as he the said *H. G.* shall continue and be employed by the said *H. S.* as his agent, well and faithfully serve him the said *H. S.* without consuming, embezzling, losing, misspending, misapplying, or unlawfully making away with any of the moneys, goods, &c. of him the said *H. S.*, which shall be committed to the charge, care, custody or keeping of the said *H. G.*, by reason or means of his so being agent for the said *H. S.* as

(a) This case was moved early in the term.

aforesaid; and if the said *H. G.* shall at any time during the time of his being agent as aforesaid to the said *H. S.*, neglect to account with him the said *H. S.*, his executors, &c. weekly, or oftener if thereunto required by the said *H. S.*, his executors, &c. by reasonable notice in writing, under his or their hands for that purpose, to be given or left with him the said *H. G.* at his house, or usual place of abode, then if the said *H. G.* and *William Dalley*, or either of them, their or either of their heirs, &c. any or either of them, do and shall, within one month next after due proof thereof by confession of the said *H. G.* or otherwise howsoever, and notice thereof given or left at or in the dwelling-house of the said *W. D.*, his heirs, &c. in writing or otherwise, make good and sufficient recompence, satisfaction, and payment to the extent of the full sum of 100*l.* unto the said *H. S.* his executors, &c. (provided his or their loss shall amount to that sum,) for the moneys, goods, &c. of the said *H. S.* so lost, wasted, misspent or misapplied as aforesaid, by means of the said *H. G.* neglecting or refusing to account as aforesaid, then this obligation to be void, &c. The declaration assigned the following breach:—"That *H. G.* was and continued to be employed by the plaintiff as such agent as aforesaid, for a long time, to wit, for the space of three years next after the date of the said writing obligatory, to wit, at &c. And that after the making of the said writing obligatory, and within three years from the date thereof, and during the time *H. G.* was so employed by the plaintiff as such agent as aforesaid, to wit, on the 13th day of April, 1828, and on divers other days and times between that day and the 17th day of February, 1831, at &c. *H. G.* embezzled &c. divers sums of money of the plaintiff, in the whole amounting to a large sum, to wit, 500*l.*, which several sums of money respectively were received by and committed to the charge, care, custody and keeping of *H. G.* as such agent as aforesaid, and by reason and means of his so being such agent to the said plaintiff

1832.

STOTHERT
v.
GOODFELLOW.

1832.

STOTHERT

v.

GOODFELLOW.

as aforesaid, that is to say, after the making of the said writing obligatory, to wit, on the several days last aforesaid, at &c. And that afterwards, and more than one month before the expiration of three years next after the date of the writing obligatory, to wit, on &c. at &c. there was due proof by confession of *H. G.* and otherwise had, that *H. G.* had so embezzled &c. the said several sums of money. And that notice of the premises was afterwards, and more than a month before the expiration of three years from the date of the writing obligatory, to wit, on &c. at &c. given to the defendant *W. D.* Yet the defendants did not, nor did either of them, within one month after such proof as aforesaid, and notice thereof given as aforesaid, or at or after the expiration of that month, make any recompence, satisfaction, or payment, to the extent of the sum of 100*l.* unto the said plaintiff, (although his the said plaintiff's loss, by reason of the premises, amounted to that sum and more,) for the moneys of the plaintiff so embezzled &c. by *H. G.* as aforesaid, but did, and each of them did, wholly neglect and refuse so to do, contrary to the tenor &c." To this declaration the defendants pleaded *non est factum*, and several special pleas; upon which issue was joined. At the trial at the last Wilts assizes, before *Patterson, J.*, a verdict was found for the plaintiff.

Barstow now moved in arrest of judgment. The breach is not well assigned; first, it is not averred that *Goodfellow* neglected to account; and secondly, it is not stated that notice in writing, under the hand of the plaintiff, was given to *Goodfellow*, requiring him to account. Both these circumstances are material, and without them the condition is not broken (*a*).

(*a*) Here, by the express terms of the condition (*suprà*, 203), the confession of *Goodfellow*, the principal, was to be evidence against

Dalley, the surety. As to the general question with respect to the admissibility of entries made by the principal, to charge the surety,

By the COURT.—The condition of this bond is obscure, and it is difficult to ascertain what the true meaning of it is. We think that the breach in this case is substantially well assigned. The condition consists of two branches, the first, that *Goodfellow* shall serve the plaintiff without embezzling the moneys committed to his charge; the second branch, that if *Goodfellow* shall neglect to account with the plaintiff weekly, or oftener if required, by notice in writing, under the hand of the plaintiff, to be left at the residence of *Goodfellow*, then *Goodfellow* and his surety shall, within one month after proof and notice thereof given to the latter at his residence, make payment to the amount of 100*l.* (if the loss amount to that sum). Under the first branch of this condition, it is not necessary that any notice should be given by the plaintiff to *Goodfellow*. Notice is only required by the second branch of the condition. There is a positive averment that *Goodfellow* did embezzle moneys. The breach is therefore well assigned on the first branch of the condition; and the circumstance of the allegation of embezzlement having other matter mixed up with it, will not vitiate the assignment.

1832.
STOTHERT
v.
GOODFELLOW.

Rule refused. (a)

see *Cutler v. Newlin*, cor. *Holroyd*, J., Mann. N. P. Digest, 2d edit. 137; *Evans v. Beattie*, 5 Esp. N. P. C. 26; *Bacon v. Chesney*, 1 Stark. N. P. C. 192; *Goss v. Watlington*, 3 Brod. & Bingh. 132;

S. C. 6 B. Moore, 355; *Whitmarsh v. Genge*, 3 Mann. & Ryl. 42.

(a) And see *Calvert v. Gordon*, 1 Mann. & Ryl. 497, and 7 Barn. & Cressw. 809; S. C., upon a second argument, 3 Mann. & Ryl. 124.

1832.

CLARKE v. IMPERIAL GAS LIGHT and COKE COMPANY.

Held, that the directors of an incorporated manufacturing company, having the legal custody of the corporate seal, are authorized to affix it to an indenture granting an annuity, by way of retiring pension, to an officer of the company in consideration of past services, and subject to a proviso restricting the grantee from manufacturing or assisting in the manufacture of the article;—and that where the charter of incorporation requires the assent of the corporate body, convened in a particular manner, to the affixing of the corporate seal by the directors, it lies upon the corporate body impugning the authority of the directors, repudiating their act in affixing the seal, and disclaiming the contract, to shew that no such assent was formally given.

COVENANT upon an indenture, dated 7th September, 1827, whereby the defendants, under their corporate seal, granted to the plaintiff an annuity of 400*l.*, payable quarterly. Breach assigned in the nonpayment of four quarterly instalments.

The defendants craved oyer of the indenture; whereby, after reciting that the Company had been incorporated and established for lighting certain parts of the metropolis and parts adjacent with gas, by virtue of two several acts of parliament, one passed in the 1st & 2d Geo. 4, and the other passed in the 4th Geo. 4; and that the plaintiff, at the first general meeting of the Company after the passing of the first mentioned act, had been nominated and appointed clerk of the Company, under and pursuant to the powers and authorities of the first mentioned act, and had since been the clerk of the Company, and had received an annual salary of 700*l.* for his services in his said office of clerk; and that the plaintiff had at all times since his said appointment diligently exerted himself in the affairs of the Company, and faithfully executed and discharged the duties of his said office; and that by such the exertions and conduct of the plaintiff the prosperity and success of the Company had been much promoted, but that the plaintiff had been lately incapacitated by ill health from his accustomed personal attention to the duties of the said office: and reciting that a certain committee of proprietors, duly appointed by a general meeting of the Company, by their report in writing made to a special general meeting of the Company, held at the London Tavern, &c. on the 3d day of August then last, had represented

that from the state of health of the clerk of the Company he had been reduced to the necessity of applying for leave of absence repeatedly; and that it appeared expedient that he should be invited to retire from the office, and that a pension of 400*l.* per annum for life should be allowed to him, with the usual condition of abstaining from all acts to the prejudice of the Company; and that the same had been proposed to him, and he had expressed his willingness so to retire if the proposition received the approbation of the proprietors; and that the committee did therefore recommend such arrangement to the approval of the proprietors at such meeting; and reciting that the said meeting of the Company, on the 3rd day of August then last, had unanimously resolved that the report of the committee should be received and approved, and that it should be referred to the directors of the Company to carry the recommendations and suggestions therein contained into effect; and that the said report and the proceedings of the said general meeting having been communicated to the plaintiff, he had, on the day of making that deed, in consideration of a grant of a pension or annuity of 400*l.* to him for life, pursuant to the resolutions of the said general meeting, resigned the office of clerk to the Company: It was by the said indenture witnessed, that for and in consideration of the past services and exertions of the plaintiff for and on behalf of the Company, and of his resignation of the said office of clerk to the Company, in compliance with the said report and the said proceedings at the said general meeting as aforesaid, and also in consideration of the sum of 5*s.*, the Company, in pursuance of &c. and in exercise of any powers or authorities to them given or in them vested by the aforesaid acts of parliament or either of them, and of every other power and authority in anywise enabling them in that behalf, granted to the plaintiff one pension or annuity or clear annual sum of 400*l.* out of and from &c. charged and chargeable &c.: To have, hold, receive, percieve, and take the said annuity unto the plaintiff,

1832.

CLARKE
v.IMPERIAL
GAS LIGHT
COMPANY.

1831.

CLARKE

v.

IMPERIAL
GAS LIGHT
COMPANY.

his executors &c. from the day of the date &c. for the term of his natural life and up to the day of his decease; the said annuity to be payable at &c. on certain days therein named, clear of and from any deduction or abatement whatsoever. (Covenant for payment of the annuity.) Proviso, that the said pension or annuity should be forfeited, and the grant thereof, and the covenant for securing the same, should become void in case the plaintiff should either in his own name or on his own account, or in the name or names or on account of any other person or persons, manufacture or supply, or should become or be an officer of or otherwise in any manner connected with or engaged by, or should promote or interfere in the affairs, business or conduct of any other company then or thereafter established, whether incorporated or not, and whether established by act of parliament or charter or not, or of any individual or individuals who should manufacture or supply, or undertake to manufacture or supply, any gas for lights in such parts of the city of Westminster or elsewhere within the district of the metropolis and its environs, as the Company were then entitled to supply and light with gas, unless by and with the consent and approbation of the proprietors of the said Company, to be testified by a resolution of a general meeting of such proprietors specially called for such purpose.

Upon which the defendants pleaded non est factum.

At the trial of the cause before Lord *Tenterden*, C.J., at the sittings after Michaelmas term, 1831, a verdict was found for the plaintiff, damages 400*l.*, subject to the opinion of this Court upon the following case:

(The case, after setting out the pleadings as above, proceeded thus:) The plaintiff produced the indenture, and proved the seal affixed thereto to be the defendant's corporate seal.

On the part of the defendants it was contended that the deed was invalid; and in support of the defence the following evidence was tendered:—A general meeting of proprie-

tors of the said Company was held at the London Tavern, Bishopsgate Street, on Thursday, the 8th day of March, 1827, which was duly convened according to the acts of parliament hereinafter mentioned, and which was attended by many, but not by all the proprietors. The proceedings are entered in the books of the Company as follows, and the entries are correct statements of the business transacted at such meeting:

“Resolved, that a committee be appointed to investigate and examine the accounts of the Company from its formation to the present period (any three of whom shall form a quorum), and that such committee shall have the power to call for the production of or to inspect all books, documents, vouchers and papers, in the custody or power of the directors and of every officer of the Company, and to report.”

“Resolved, that the directors, the treasurer, the clerk of the Company, and every other officer of the Company, shall be requested and authorized to give such information to the said committee, or the quorum thereof, as may be required.”


“Resolved, that such committee shall be requested to prepare and make up a debtor and creditor account, and to prepare a balance sheet, containing a full statement of the accounts and affairs of the Company, and that the same, when signed by the governor, shall be open to the inspection of the proprietors.”

“Resolved, that the committee shall be requested and empowered to examine into and consider the several duties of the several officers of the Company in all or any of their several departments, together with the salaries attached to their offices, and to report thereon at the next general meeting of the proprietors.”

Much other business is entered in the books as having been transacted at the meeting on the 8th of March, but which is not material to the present case.

On the 23d day of July, 1827, the plaintiff, who was at

1852.
CLARKE
V.
IMPERIAL
GAS LIGHT
COMPANY.

1832.

 CLARKE
 v.
 IMPERIAL
 GAS LIGHT
 COMPANY.

that time clerk to the Company, as such clerk sent to the then proprietors of the Company a circular letter, of which the following is a copy:—"Imperial Gas Light and Coke Company. Sir,—I am ordered by the court of directors to inform you that a special general meeting of the proprietors will be held at the Old London Tavern, &c. on Friday, the 3d day of August next ensuing, at twelve o'clock at noon, to receive the report of the committee appointed to examine into the accounts and concerns of the Company at the general meeting held on the 8th day of March last, and to adopt such measures thereon as the said meeting shall deem expedient. The chair to be taken at one o'clock. Office, No. 10, Coleman Street, July 23d, 1827. (Signed) *Henry Clarke*, clerk to the Company." Advertisements, similar to the above letter, were inserted in the newspapers as required by act of parliament. On the 3d day of August, 1827, in pursuance of the circular before mentioned and the advertisements, a special general meeting of proprietors, which was attended by some but not all the proprietors, was held at the London Tavern, Bishopsgate Street. The proceedings at such meeting are entered in the books of the Company as follow, and the entries are correct statements of the business transacted at such last-mentioned meeting :

The advertisements for convening the meeting were read from the Morning Chronicle and the New Times, both dated the 24th July, 1827, and the circular letter to the proprietors was also read. The committee of proprietors appointed at the general meeting of the 8th day of March last, to examine into the accounts and concerns of the Company, presented their report, which was read.

It was then resolved, that the report now read be received and entered upon the minutes of the general meetings of this Company, and that the directors be instructed to take the necessary steps for carrying into effect the several recommendations therein mentioned. The report, which is very long, and relates to various matters, contains

the following paragraph only relating to the clerk:—"From the state of health of the clerk of the Company, he has been reduced to the necessity of applying for leave of absence repeatedly, and it appears expedient that he shall be invited to retire from the office, and that a pension of 400*l.* per annum for life shall be allowed to him, with the usual condition for abstaining from all acts to the prejudice of the Company. The same has been proposed to him, and he has expressed his willingness so to retire, if this proposition receive the approbation of the proprietors. Your committee therefore recommend this arrangement for your approval. They consider it will be a very small burthen upon the Company, as whenever a new clerk shall be appointed, the duties not being so great now as during the foundation of the Company, his salary may be fixed at a lower rate than heretofore."

On the 7th of September, 1827, a circular letter, of which the following is a copy, was sent to the proprietors:
"Imperial Gas Light and Coke Company, Sept. 7, 1827.


"Sir,—I am ordered to inform you that a special general meeting of the proprietors will be held at the London Tavern, Bishopsgate Street, on Wednesday the 19th day of September next ensuing, at one o'clock precisely, for the purpose of electing a fit and proper person to be clerk of the Company, in the place of Mr. *Henry Clarke*, who has resigned.

Signed, *Bartholomew Mayhew*, clerk, pro temp."

Advertisements similar to the above letter were inserted in the newspapers, as required by the act of parliament.

On the 19th of September, 1827, in pursuance of the last-mentioned circular and the advertisements, a special general meeting of the proprietors, which was attended by some, but not all the proprietors, was held at the London Tavern. The proceedings of such meeting are entered in the books of the said Company as follows, and the entries are correct statements of the business transacted at such last meeting:—"The notice for convening the meeting was

1832.
CLARKE
v.
IMPERIAL
GAS LIGHT
COMPANY.

1832.

 CLARKE
 v.
 IMPERIAL
 GAS LIGHT
 COMPANY.

read; the governors presented and read the report of the court of directors in the words following; that is to say, 'To the Proprietors of the Imperial Gas Light and Coke Company. Your directors, in conformity with the resolution passed at a general meeting of the proprietors held on the 3d of August last, proceeded to carry into effect the order for granting an annuity of 400*l.* to Mr. *Henry Clarke*, who has acceded to the terms proposed, and in consequence resigned the situation of clerk to this Company.'” Then follow entries of other business transacted at the same meeting, but which entries do not affect this cause. The indenture on which this action was brought was before the commencement of the action assigned to *David Dickson*, and he being a member of the Company attended the several meetings before mentioned as such proprietor. No proof was offered of the time or manner of affixing the corporate seal, or of any authority or direction given to any person to affix the same, except such as has been before mentioned, or as may be inferred from the proceedings that are set forth.

The Company was incorporated by the 1 & 2 *Geo.* 4, c. 117, and has been regulated by 4 *Geo.* 4, c. 95, and 10 *Geo.* 4, c. 12, and the several acts are to be taken as part of this case. Not any of the entries before mentioned and set forth is under the corporate seal of the Company.

The questions for the opinion of the Court are,

First, Whether the evidence so tendered by the defendants could be received?

Secondly, If it could be so received, whether it constituted a defence to the action, by shewing the deed to be void?

If the Court shall decide these questions in the affirmative, a nonsuit is to be entered; otherwise the verdict is to stand.

Platt, for the plaintiff. The books could not be evidence for the Company. Whether this deed be properly

executed according to their internal regulations, or not so, is a matter amongst themselves, of which third parties are not bound to take notice. The Company have a corporate seal; and this seal being set to any deed is such evidence of their being parties, that it cannot be invalidated by any thing which may appear from their own books. If a grant had been made purporting to be a grant from the corporation of London, and the seal of the corporation had been affixed to the instrument by the ordinary officer, would that body be allowed to produce their own private books to shew that the officer was not authorized to affix the seal? A corporation is in no better situation in this respect than a private individual. The execution of this deed was within the scope and authority of the directors, and in furtherance of the objects of the Company. It is an annuity granted, partly as a reward for the past services of a meritorious servant, and partly in consideration of a covenant on the part of the plaintiff not to give his services, as he might otherwise do, to any other Gas Company, or any other individual gas manufacturer, so as to injure the affairs of the defendants.

1839.

CLARKE

v.

IMPERIAL
GAS LIGHT
COMPANY.

R. V. Richards, *contrâ*. There is this difference between the execution of deeds by individuals and the execution of deeds by corporations, that in the one case it is requisite to prove the execution and delivery, whereas in the other the seal is sufficient *primâ facie* evidence of an execution by the corporation. But this *primâ facie* evidence may be rebutted by evidence on the part of the corporation, that the seal was not affixed to the instrument by their authority. Under the plea of *non est factum*, whatever shews that the individual had no contracting mind may be given in evidence; so also that at the time of execution he was incapable of making a valid deed; *Thompson v. Rock* (a). In *Stoytes v. Pearson* (b) it was held, that under the plea of *non est factum* the defendant may give in evidence that the

Distinction
between exe-
cution of deeds
by individuals
and by corpo-
rations.

(a) 1 M. & S. 338.

(b) 4 Esp. 255.

1832.
 CLARKE
 v.
 IMPERIAL
 GAS LIGHT
 COMPANY.

deed was delivered as an *escrow*. Nor is there any distinction in this respect between an individual and a corporation; as appears from an anonymous case in 12 *Modern* (a), where it was held, that where a person, pretending to be mayor, puts the corporate seal to a deed, it is not by that the deed of the corporation. And *Derby Canal v. Wilmot*, bart. (b), shews that the production of a deed to which the corporate seal has been affixed by order of the Company, does not exclude evidence as to the circumstances which accompanied the execution. No authority is given by any of the acts of parliament to delegate business of this description to a committee. This is no more the deed of the corporation, than a deed executed by an attorney acting under an invalid power of attorney is the deed of the principal. The 71st section of the act of 1 & 2 *Geo.* 4, which enacts that the directors for the time being shall have the custody of the common seal of the Company, and shall have full power and authority to use the same for the affairs and concerns of the Company, and shall have full power and authority to direct, manage, and transact the affairs and business of the Company, does not authorize them to affix the seal to such a deed as that to which it was affixed by the directors in this instance.

Gas company
 not authorized
 to grant annuities.

The deed is made for a purpose not warranted by the act, the object of the legislature in passing the act having been to form a Company for the purpose of supplying the metropolis with gas and coke, and not a Company for the granting of annuities, as this Company might become if the plaintiff were allowed to recover; *Broughton v. Manchester and Salford Waterworks* (c), *Hill v. Manchester and Salford Waterworks* (d).

Meeting not
 duly convened.

But, supposing the Company at large to have the power to grant such annuity, yet they have not conformed to the provisions of the act in several respects. The meeting, which was a special general meeting, was not summoned

(a) Case 728, p. 423.

(b) 9 East, 360.

(c) 3 Barn. & Alders. 1.


(d) 2 Barn. & Adol. 544.

according to the provisions of the 70th and 61st sections. The 70th section gives power to the directors, at any time and for any purpose, to call a special general meeting, of which notice is to be given, by advertisement in two daily newspapers, ten days at least previously to the meeting, and also by letter from the clerk of the Company, sent to each proprietor entitled to vote at such meeting; and by the 61st section it is enacted, that no business shall be transacted at any special general meeting besides the business for which it shall have been called. From the books, which are made evidence by the 60th clause of the act, it appears that the notice given for the purpose of calling the meetings at which the resolutions affecting the question as to this annuity were passed, did not mention this particular business, and therefore the proprietors had no power to transact the business of the annuity at either of the meetings.

The 76th section, which gives power to the Company at their general or special general meetings to make rules, orders and bye-laws for the good government of the Company, and for regulating the proceedings of the directors, and for regulating all officers, workmen and servants employed in the affairs of the Company, and which therefore, if the granting of this annuity be not inconsistent with the general purposes for which the Company was established, might enable the proprietors to have authorized the directors to execute this deed, requires that such rules, orders and bye-laws shall be under the common seal of the Company, and countersigned by the clerk. The resolutions in this case were simply entered in the Company's books and signed by the clerk, and were not under seal. *Dunston v. Imperial Gas Light and Coke Company (a).*

Plutt, in reply. There is no analogy between the present case and those which have been cited respecting the execution of a deed by an individual. It is admitted that under the plea of non est factum, it may be shewn that

(a) 3 Barn. & Adol. 125.

1832.

 CLARKE
 v.
 IMPERIAL
 GAS LIGHT
 COMPANY.

1852:

 CLARKE
 v.
 IMPERIAL
 GAS LIGHT
 COMPANY.

Books made
 evidence only
 as between
 members of
 the corpora-
 tion.

the party who has affixed his seal had no contracting mind, or was covert, or an infant, or in any way incapable of making a valid deed, or that the deed was delivered as an escrow; because in all those cases the evidence shews that it never was a deed. The entries which are offered in evidence in this case do not go to shew that the deed is void; for this was an affair and concern of the Company, and therefore the directors had power under the act to affix the seal to any deed relating to it: Sect. 61. In this case the seal was affixed by some of the actual directors, no fraud being practised upon them; and there is therefore no similarity between this case and that of the pretended mayor. It is said that the act has declared that the books of the Company shall be evidence. That is true as between the different members of the Company, but not as against strangers. It is absurd to say that in order to enable the directors to affix the corporate seal there must be a resolution to that effect *under seal*; for it might be also said that there should be a resolution *under seal* to enable them to make this resolution. In the case of *Dunston v. Imperial Gas Light Company (a)*, the resolution which formed the supposed contract upon which the action was brought was not under the seal of the Company. In *Broughton v. Manchester and Salford Waterworks*, the action was brought upon a bill of exchange accepted by the Company; and the ground of the decision was, that if the Company were permitted to accept bills of exchange payable at less than six months after date, the provisions of the several acts relating to the Bank of England would be avoided. The same reason does not apply to the deed upon which the action is brought in the present case.

Grant of an-
 nuity for past
 services.

It is contended that the granting of this annuity was not an act done in furtherance of the general object for which the Company was established. The payment of their servants must be within the scope of the act; and this deed, upon the face of it, is given by way of remuneration for past services.

(a) 3 Barn. & Adol. 125.

At a subsequent day in this term, the judgment of the Court was delivered by

DENMAN, C. J.—In this case the question turned upon the validity of an annuity granted by the Company to Mr. *Clarke*, who had been in their service, and which was in the nature of a retiring pension given to that gentleman on the ceaser of his services to the Company.

It was contended, in the first place, that this deed was void, as not having been executed in conformity with the provision of the act of parliament by which the Company was constituted; and the case was put of the seal of a corporation affixed by one who had assumed the office of mayor. But here the seal was undoubtedly applied by those who had the legal custody of it, that is, the directors of the Company.

It was further contended that the deed was for a purpose not warranted by the act; and *Broughton v. The Manchester and Salford Waterworks* was supposed to apply. In that case the Court decided that a bill of exchange could not bind the Company, who, as the plaintiff was bound to know, could only contract under seal; otherwise the corporation would become a banking company instead of a company for supplying the town of Manchester with water. So, it was argued, on the part of the defendant's counsel, that this, which is a company for supplying London with gas, would be converted into a company for granting annuities, if a deed of this kind were to be sustained. We are, however, of opinion that the general authority confided to the directors to manage the concerns of the Company may well authorize a grant like this; particularly to an officer entitled to a salary, wishing to retire from ill health, and agreeing to abstain from transferring his services to any other company.

A third objection was, that no such contract could be made without the consent of the general body of proprietors, called together by notice for this particular object. The act does require this; and if we could distinctly

1832.

CLARKE
v.IMPERIAL
GAS LIGHT
COMPANY.

First point,—
corporate seal
affixed by per-
sons having
legal custody.

Second
point,—grant
of annuity au-
thorized by
act.

Third point,—
consent pre-
sumed.

1839.

CLARKE

v.

IMPERIAL
GAS LIGHT
COMPANY.

see that the forms prescribed by the act in transactions affecting the Company's property had not been complied with, the argument on this point would be entitled to great weight. But, on the contrary, if we were to inquire into the facts, we might perhaps find that the forms of the act had been strictly complied with. It is enough, however, to observe that proof of this irregularity does not appear in plain terms upon the case; and the Company, seeking to set aside its own formal act on the ground of irregularity in the preliminary proceedings, ought to make out such a defence by the most cogent proof. Although the special case sets out the proceedings which are impeached as irregular, there is no pretence for saying that other proceedings may not have taken place by which all the terms required by the act of parliament were complied with. For any thing which appears in this case, there is a possibility that due notice may have been given for considering whether the proposal made by the committee should not be carried into effect, and that the general meeting of proprietors may have concurred with the directors. If this were regularly done before affixing the seal to the instrument, all would be right; and inasmuch as the seal was set, by those who had the power of affixing it, to an instrument to give effect to a bargain which the Company had power to make, and as no fraud is found in the case to attach to the plaintiff, and there is a possibility upon the facts set forth that the apparent irregularity may not have occurred, we think the plaintiff is entitled to judgment in this case.

As our opinion proceeds upon the supposition that the facts set forth in the Company's books are true, the question whether they were admissible in their behalf does not arise.

Postea to the plaintiff (a).

(a) See *Dickinson v. Vulpy*, 5 Mann. & Ryl. 126; 10 Barn. & Cressw. 128, S. C.

1832.

THE FOLLOWING GENERAL RULES,

Agreed upon by the Judges in pursuance of the statute 2 William 4, chap. 39, were read at the commencement of this Term.

1. It is Ordered, That every Writ of Summons, Capias, and Detainer, shall contain the names of all the defendants (if more than one) in the action, and shall not contain the name or names of any defendant or defendants in more actions than one.

How many defendants to be included in process.

2. It is further Ordered, That the following fees shall be taken :

Fees.

s. d.

For signing all Writs for compelling an appearance, whether of Summons, Distringas, Capias, or Detainer, and whether the same shall be the first Writ, or an Alias or Pluries Writ, and whether the same shall issue into the same county as the preceding Writ, or into a different county, - - - - - 2 6

For sealing the same, - - - - - 0 7

For entering an appearance, for every defendant, - 1 0

Unless an appearance shall be entered for more than one defendant by the same attorney; and in that case, for every additional defendant, - 0 4

3. It is further Ordered, That the person serving a Writ of Summons shall, within three days at least after such service, indorse on such writ the day of the week and month of such service, otherwise the plaintiff shall not be at liberty

Indorsement of time of service of process.

1832.

Regulæ gene-
rales.

to enter an appearance for the defendant, according to the statute ; and every affidavit upon which such an appearance shall be entered, shall mention the day on which such indorsement was made.

Indorsement
of time of exe-
cution of pro-
cess.

4. It is further Ordered, That the Sheriff or other officer or person to whom any Writ of Capias shall be directed, or who shall have the execution and return thereof, shall, within six days at the least after the execution thereof, whether by service or arrest, indorse on such writ the true day of the execution thereof; and in default thereof, shall be liable in a summary way to make such compensation for any damage which may result from his neglect, as the Court or a Judge shall direct.

5. It is further Ordered, That the second Rule of Hilary Term, 1832, shall be applicable to all Writs of Summons, Distringas, Capias, and Detainer issued under the authority of the said Act, and to the copy of every such writ.

Testatum
writs.

6. It is further Ordered, That any Alias or Pluries Writ of Summons may, if the plaintiff shall think it desirable, be issued into another county, and any Alias or Pluries Writ of Capias may be directed to the Sheriff of any other county, the plaintiff in such case upon the Alias or Pluries Writ of Summons describing the defendant as late of the place of which he was described in the first Writ of Summons ; and upon the Alias or Pluries Writ of Capias referring to the preceding writ or writs as directed to the Sheriff to whom they were in fact directed.

Form of tes-
tatum writs.

7. It is further Ordered, That the Alias or Pluries Writ of Summons into another county, shall be in the following form :

William the Fourth &c.

To C. D. of , in the county of , late of

, in the county of _____, [original county.] 1832.
 We command you, as before (or often), We have com-
 manded you (a,) &c. (as in the Writ of Summons No. 1, <sup>Regulæ gene-
rales.</sup>
 in the Schedule of the said Act.)

And that the Alias and Pluries Writ of Capias shall be
 in the following form :

William the Fourth, &c.

To the Sheriff of _____, We command you as hereto-
 fore We have commanded the Sheriff of _____, that
 you omit not, &c. (as in the Writ of Capias No. 4, in
 the Schedule of the said Act.)

8. It is further Ordered, That in every Writ of Distringas Non omittas.
 issued under the authority of the said Act, a Non Omittas
 clause may be introduced by the plaintiff without the pay-
 ment of any additional fee on that account.

9. It is further Ordered, That when the attorney actually Indorsement
 suing out any writ, shall sue out the same as agent for an of name and
 attorney in the country, the name and place of abode of attor-
 ney. such attorney in the country shall also be indorsed upon
 the said writ.

10. It is further Ordered, That if the plaintiff or his at- Omission, not
 torney shall omit to insert in, or indorse on, any writ or copy to render pro-
 thereof, any of the matters required by the said Act, to be cess void, but
 irregular. by him inserted therein or indorsed thereon, such writ or
 copy thereof shall not on that account be held void, but may
 be set aside as irregular, upon application to be made to
 the Court out of which the same shall issue, or to any
 Judge.

11. It is further Ordered, That upon all Writs of Capias, Declaration
 where the defendant shall not be in actual custody, the de bene esse.
 plaintiff, at the expiration of eight days after the execution
 of the writ, inclusive of the day of such execution, shall be

a) This appears to be misco- before We commanded (or, as often
 pied. The original would be, " as We have commanded) you."

1832.

Regulæ générales.

at liberty to declare *de bene esse*, in case special bail shall not have been perfected : and if there be several defendants, and one or more of them shall have been served only, and not arrested, and the defendant or defendants so served shall not have entered a common appearance, the plaintiff shall be at liberty to enter a common appearance for him or them, and declare against him or them in chief, and *de bene esse* against the defendant or defendants who shall have been arrested, and shall not have perfected special bail.

Adjournment
of pleadings
from 10th Au-
gust to 24th
October.

12. It is further Ordered, That in case the time for pleading to any declaration, or for answering any pleading, shall not have expired before the tenth day of August in any year, the party called upon to plead, reply, &c. shall have the same number of days for that purpose after the twenty-fourth day of October, as if the declaration or preceding pleading had been delivered or filed on the twenty-fourth day of October; but in such cases it shall not be necessary to have a second rule to plead, reply, &c.

Attachment to
issue for dis-
obedience of
a Judge's Or-
der, without
service of the
Rule of Court.

13. It is further Ordered, That in case a Judge shall have made an order in vacation for the return of any writ issued by authority of the said act, or any Writ of Capias ad Satisfaciendum, Fieri Facias or Elegit, on any day in vacation, and such order shall have been duly served, but obedience shall not have been paid thereto, and the same shall have been made a Rule of Court in the term then next following, it shall not be necessary to serve such Rule of Court or make any fresh demand of performance thereon, but an attachment shall issue forthwith for disobedience of such order, whether the thing required by such order shall or shall not have been done in the mean time.

Proceedings to
be stayed
where attorney
disavows the
issuing of the
process.

14. It is further Ordered, That if any attorney shall, as required by the said Act, declare that any Writ of Summons or Writ of Capias, upon which his name is indorsed, was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed until further order.

15. It is further Ordered, That every declaration shall in future be entitled in the proper Court, and of the day of the month and year on which it is filed or delivered, and shall commence as follows :

1832.

Regulæ generales.

Declaration after Summons.

Title of declaration.

(Venue) A. B. by E. F. his attorney (or in his own proper person) complains of C. D. who has been summoned to answer the said A. B. &c.

Declaration after Arrest where the party is not in custody.

(Venue) A. B. by E. F. his attorney (or in his own proper person) complains of C. D. who has been arrested at the suit of the said A. B. &c.

Declaration where the party is in custody.

(Venue) A. B. by E. F. his attorney (or in his own proper person) complains of C. D. being detained at the suit of the said A. B. in the custody of the Sheriff (or of the Marshal of the Marshalsea of the Court of King's Bench, or of the Warden of the Fleet.)

Declaration after the Arrest of one or more defendant or defendants, and where one or more other defendant or defendants shall have been served only, and not arrested.

(Venue) A. B. by E. F. his attorney (or in his own proper person) complains of C. D. who has been arrested at the suit of the said A. B. (or being detained at the suit of the said A. B. as before) and of G. H. who has been served with a Writ of Capias, to answer the said A. B. &c.

16. And that the entry of pledges to prosecute at the conclusion of the declaration shall in future be discontinued. Pledges to prosecute, to be discontinued.

TENTERDEN,
N. C. TINDAL,
LYNDHURST,
J. BAYLEY,
J. A. PARK,
J. LITLEDAL,DALE,
S. GASELEE,
J. VAUGHAN,

J. PARKE,
W. BOLLAND,
J. B. BOSANQUET,
W. E. TAUNTON,
E. H. ALDERSON,
J. PATTESON,
J. GURNEY.

1832.

Regula generalis.

if in Durham, that by Our writ under the seal of your bishoprick, to be duly made and directed to the Sheriff of the county of Durham, you cause the said Sheriff to be commanded] that he omit not by reason of any liberty in his bailiwick, but that he enter the same and take *C. D.* of ————— if he shall be found in his bailiwick, and him safely keep until he shall have given him bail, or made deposit with him according to law, in an action on promises [*or of debt, &c.*] at the suit of *A. B.*, or until the said *C. D.* shall by other lawful means be discharged from his custody, and that he further command him that on execution thereof he do deliver a copy thereof to the said *C. D.*, and that the said writ do require the said *C. D.* to take notice that within eight days after execution thereof on him, inclusive of the day of such execution, he shall cause special bail to be put in for him in Our Court of ————— to the said action, and that in default of his so doing, such proceedings may be had and taken as are mentioned in the Warning thereunder written or indorsed thereon: and that he further command the said Sheriff that immediately after the execution thereof he do return that writ to Our said Court, together with the manner in which he shall have executed the same, and the day of the execution thereof, or that if the same shall remain unexecuted, then that he do so return the same at the expiration of four calendar months from the date thereof, or sooner if he shall be thereto required by order of the said Court or by any judge thereof.

Witness ————— at Westminster the —————
day of ————— in the ————— year of Our
reign.

Memorandum to be subscribed to the Writ.

N. B.—This writ is to be executed within four calendar months from the date thereof, including the day of such date, and not afterwards.

A Warning to the Defendant.

1832.

1. If a defendant being in custody shall be detained on this writ, or if a defendant being arrested thereon shall go to prison for want of bail, the plaintiff may declare against such defendant before the end of the term next after such detainer or arrest, and proceed thereon to judgment and execution. Regula generalis.
Declaration.
2. If a defendant being arrested on this writ shall have made a deposit of money according to the statute 7th and 8th George 4, chap. 71, and shall omit to enter a common appearance to the action, the plaintiff will be at liberty to enter a common appearance for the defendant, and proceed thereon to judgment and execution. Entering appearance, after deposit.
3. If a defendant having given bail on the arrest shall omit to put in special bail as required, the plaintiff may proceed against the sheriff or on the bail bond. Attachment.
Assignment of
Bail bond.
4. If a defendant having been served only with this writ, and not arrested thereon, shall not enter a common appearance within eight days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and execution. Entering appearance, after service of process.

Indorsements to be made on the Writ of Capias.

Bail for £ by affidavit

Or

Bail for £ by order of [naming the
judge making the order] dated the day
ofThis writ was issued by E. F. of
attorney for the plaintiff [or plaintiffs] within named.

Or

This writ was issued in person by the plaintiff within
named [mention the city, town or parish, and also the

1832.

Regula gene-
ralis.

*name of the hamlet, street, and number of the house of
the plaintiff's residence, if any such there be].*

N. C. TINDAL,	J. PARKE,
LYNDHURST,	W. BOLLAND,
J. BAYLEY,	J. B. BOSANQUET,
J. A. PARK,	W. E. TAUNTON,
J. LITLEDALE,	E. H. ALDERSON,
S. GASELEE,	J. PATTESON,
J. VAUGHAN,	J. GURNEY.

MEMORANDA.

ON the 4th of November died the Right Honourable CHARLES LORD TENTERDEN, Lord Chief Justice of England, having been appointed to the office upon the same day in November, 1818.

He was succeeded by Sir THOMAS DENMAN, Knight, his Majesty's Attorney-General, who was called to the degree of Serjeant-at-Law, and gave rings with the motto "Lex omnibus una," and, on the 8th day of November, was sworn into his office, before the Lord Chancellor, and took his seat on the bench on the following day.

Sir *William Horne*, Solicitor-General to his Majesty, succeeded to the office of Attorney-General; and *John Campbell*, of Lincoln's Inn, Esquire, one of his Majesty's Counsel, was appointed Solicitor-General to his Majesty, and was knighted.

On the first day of this term, *John Beames*, *Robert Mounsey Rolfe*, and *Clement Tudway Swanston*, of Lincoln's Inn, Esquires, and *Henry Hall Joy*, of the Inner Temple, Esquire, having been, during the preceding vacation, appointed his Majesty's Counsel learned in the law, were called within the bar, and took their seats accordingly.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

HILARY TERM,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

BUNNEY and another v. POYNTZ, Esq. M. P.

1833.

TROVER for twenty tons of hay. At the trial before *Littledale, J.* at the Berkshire spring assizes in 1832, the following facts appeared:—On the 5th January 1830, *Davis*, an auctioneer, was employed by the defendant to sell a quantity of hay by auction. One of the conditions of sale was, that the purchaser should pay down 4s. in the pound in part payment for each lot; another condition was, that an immediate deposit of 20 per cent. should be made, and that three months credit should be given upon approved security, within seven days of the sale, for payment of the remainder. The sixth condition was, that the lots should be taken away with all faults at the buyers' expense within forty weeks after the sale. The seventh condition was, that on non-compliance with the above conditions, the

A vendor who takes in payment a promissory note and negotiates it, loses his lien; which is not revived upon the dishonour of the note which is outstanding in the hands of an indorsee.

1833.
BUNNEY
v.
POYNTZ.

money deposited upon part should be forfeited, the lots uncleared by the time resold by private or public sale, and the deficiency, if any, made good by the defaulter. At the sale *Smallbone* became the purchaser of twenty-six tons of hay, subject to the conditions of sale, at the sum of 70*l*. *Davis*, instead of acting in pursuance of the conditions of sale, took a promissory note from the purchaser and one *Drewe*, for the whole amount of the purchase money, drawn on 6th January, payable three months after date. *Davis* paid this promissory note into the bank of the plaintiffs, who discounted the bill, and placed the amount to his credit. At this time *Davis* was indebted to the plaintiffs in a sum exceeding the amount so placed to his credit, and subsequently became bankrupt. The bill when presented by the plaintiffs to *Smallbone* was dishonoured by him. Within a fortnight after the sale, *Smallbone* cut several portions of hay, amounting to about six tons, and then by the command of the defendant, with whom it appeared *Davis* had not accounted for the price, he was prevented from cutting any more. No further attempt was made by *Smallbone* to remove the hay, and on the 6th of September the plaintiffs, who continued to be the holders of the bill, purchased from him the remainder of the hay for 75*l*, it being agreed that the note for 70*l*. given by *Smallbone*, should be deemed as a payment of part of the purchase money, and that 5*l*. should be paid at the time of signing the agreement. On the 22d September the plaintiffs demanded the hay, which the defendant refusing to deliver up, the present action was commenced. It was urged on the part of the defendant that he had a lien upon the hay for the amount of the purchase money. The learned judge told the jury that the plaintiffs stood in the same situation as *Smallbone*, and that if they thought that *Smallbone* had been prevented by the defendant from removing the hay before the note became due, the lien of the defendant was gone, and the plaintiffs were entitled to recover; but if they thought that the defendant had not prevented *Smallbone* from

removing the hay, upon the dishonour of the bill at the end of the three months, the vendor's lien revived, and in that case *Smallbone* had no right to sell nor the plaintiffs to recover. The jury found a verdict for the defendant.

In Easter term following, *Talfourd* moved for a rule to shew cause why the verdict should not be set aside and a new trial had, upon two grounds: first, that the delivery of part of the hay vested the right to the possession of the whole in *Smallbone*, and that consequently no lien could attach; and secondly, that *Davis*, as the agent of the defendant, having taken the promissory note of the purchaser and negotiated it, the lien of the vendor could not revive whilst the note was unpaid, and continued outstanding in the hands of the plaintiffs as indorsees. The Court refused to grant a rule upon the first point (a) made, but upon the second granted a rule nisi; against which,

Justice now shewed cause. The question is, whether the circumstance of the hay remaining until after the period of credit had expired, does not revive the defendant's lien for the amount of the purchase money. During the period of credit the right of lien would not exist, but after that time had elapsed, it would revive. In *Bloxam v. Saunders* (b), this point was contemplated by Mr. Justice *Bayley*, but no decision was pronounced upon it. That case was followed by *New v. Swain* (c), in which Mr. J. *Bayley* says, where the owner of goods sells on credit the buyer has a right to immediate possession; but if he suffer the goods to remain until the period of payment has elapsed, and no payment is in fact made, then the seller has a right to retain them. From the case of *Camidge v. Allenby* (d), it appears that a promissory note is no satis-

(a) After a part delivery the vendor may retain the residue for the price or for the balance remaining due; *Blake v. Nicholson*, 3 M. & S. 167.

(b) 7 Dowl. & Ry. 396; 4 Barn. & Cressw. 941.

(c) 1 Danson & Lloyd, Mercantile Cases, 193.

(d) 6 B. & C. 373.

1833.

BUNNEY
v.
POYNTZ.

1833.

 BUNNEY
 v.
 POYNTZ.

faction of a debt, unless that note be valuable. Previously to the expiration of credit there was no demand made to take away the hay. The only request which was ever made was to cut the hay in small parcels. This the purchaser had no right to do. The condition at the sale was, that the purchaser should take the whole of the hay away.

Talfourd in support of the rule. It is not necessary to review the evidence. The present case is distinguishable from those cited, as the security here is outstanding. Mr. *Poyntz* did not himself take the security, but it was received by his agent who discounted it, and received the proceeds. It must, however, be taken to have been received by him and negotiated by him. The holder of the bill has still a right to sue upon it. *Poyntz* has never been called upon to take up the bill. The authority given to *Davis* was, not to sell by auction, but to make the best he could of the articles sold. He had, therefore, authority to sell in what manner he thought proper, and in pursuance of the authority given him he took this promissory note. In *Kearslake* and another v. *Morgan*(*a*), the payee of a promissory note pleaded that he indorsed the promissory note to the plaintiffs for and on account of the debt for which the action was brought; and it was held to be a good plea, and that it was not necessary to state that the note had been dishonoured. An outstanding note is therefore satisfaction of a debt. In *Horncastle* and another v. *Farren*(*b*), the owner of a ship having a lien on certain goods until the delivery of good and approved bills for the freight, took a bill of exchange in payment, and though he objected at the time to its sufficiency, he afterwards negotiated it. *Abbott*, C. J. in that case, says, "I thought at the trial that the negotiation of the bill was to be taken as against the party negotiating it, as an approbation of the bill by him; and the owners of the ship having, by this act, declared their approbation of the bill in question, had lost

(*a*) 5 T. R. 513.

(*b*) 3 B. & Ald. 497.

their lien on the goods. I am still of the same opinion." To all intents and purposes Mr. *Poyntz* has been paid. The question is, which of two innocent parties shall suffer. There is no imputation of fraud. This case arose out of the misconduct of *Davis*; *Poyntz*, therefore, whose agent *Davis* was, ought to be the person to suffer.

1833.
BUNNEY
v.
POYNTZ.

Cur. adv. vult.

At a subsequent day the judgment of the Court was delivered by

DENMAN, C. J. who, after stating the facts of the case, and referring to what had taken place upon the motion for a new trial, said: It was argued upon this rule that the agent of the vendor having taken the promissory note of the vendee and negotiated it, the lien of the vendor did not revive upon the dishonour of the note, which was outstanding in the hands of an indorsee. We are of opinion that this argument was right. We think that the defendant is not to be considered as an unpaid vendor, and that he had no right to retain. *Davis* took the note as agent of the vendor and obtained money upon it; and it is no matter, as between *Smallbone* and the defendant, how *Davis* applied the money which he had received. By agreement between *Smallbone* and the plaintiffs, who are the holders of the note, the hay is sold to them. Under all the circumstances we think that the defendant must be considered as bound to deliver up the hay to the plaintiffs. The rule must, therefore, be made absolute for a new trial; but we think it probable that no new trial will be had, after we have stated so explicitly our opinion of the law as it arises upon the facts proved in this case.

Rule absolute.



1833.

Admissions by the under-sheriff not accompanying an act done in his official character, held, not receivable in evidence to charge the sheriff.

SNOWBALL, who &c. v. Sir HARRY GOODRICHE, Bart.

DEBT qui tam against the sheriff of Yorkshire for extortion. At the trial at the Yorkshire spring assizes, 1832, before *Alderson, J.*, an examined copy of the writ of *capias ad satisfaciendum*, in executing which extortion was alleged to have been committed, with the return thereto, was offered in evidence. Upon the writ was indorsed the name of *Bayley* as the officer to whom the warrant had been directed. In order to shew that *Bayley* was the sheriff's officer and had executed the warrant, evidence was offered of declarations made by the under-sheriff whilst he was in office and after the writ was returned, in a conversation with the person who afterwards became the attorney for the plaintiff in the original action in which the execution had issued, that *Bayley* was the officer of the sheriff who had executed the warrant issued in pursuance of the writ, upon which his name was indorsed. The learned judge rejected this evidence, and the plaintiff was nonsuited. In Easter term, 1832, a rule nisi to set aside the nonsuit and for a new trial was obtained by *J. Williams*, against which

Cresswell now shewed cause. The question is, whether the learned judge was right in rejecting evidence of declarations by the under-sheriff during his continuance in office. Any act of the under-sheriff done in the regular course of his duty, may be admissible in evidence against the sheriff. The under-sheriff may have authority to indorse on a writ the name of the party by whom it was executed, because the maker of such an indorsement is strictly within the course of his duty; and if that were proved it might be evidence against the sheriff; but the under-sheriff cannot fix his principal by voluntary admissions, because he has no authority for making such admissions. Unless the plaintiff can shew that the declarations were made whilst the party making them was acting for the sheriff, they ought not to be admitted.

J. Williams, contra. If the admissions had been made after the under-sheriff was out of office, it could not be contended that they would be admissible. At the trial the admissions were assimilated to the indorsement on the back of the writ. Proof of the writ was given by the production of an examined copy, upon which, however, appeared the name of *Bayley*. It is admitted that this was not sufficient evidence to connect *Bayley* with the sheriff, and proof was in consequence offered of a declaration by the under-sheriff that *Bayley* was an officer of the sheriff, and had been employed in the execution of the particular writ. There is no rule or order of Court, nor any act of parliament, which directs that the name of the bailiff shall be upon the writ. The indorsement is therefore merely parol secondary evidence of the execution by the particular officer whose name is indorsed. If this indorsement had been by the lowest clerk, it would have been in effect only a declaration by that clerk; and if this is admitted in evidence, *a fortiori* the declaration of the under-sheriff, who is the highest person in the office, must be receivable. In the case of *Drake v. Sykes* (a), *Law* and *Scarlett* contended that the appointment of a bailiff is evidence of a general privity between him and the sheriff, so as to fix the sheriff with his acts; and they cited the case of *Yabsley v. Doble* (b), in which the under-sheriff's confession of an escape was held evidence of the fact in an action against the sheriff, because the under-sheriff gives him a bond to save him harmless, and therefore in effect the confession goes to charge himself. But Lord *Kenyon* said that the case cited was distinguishable from the case then before the Court, because the under-sheriff is the general agent of the sheriff, which is not the case with a bailiff: and *Lawrence, J.* says, "The admission of the under-sheriff may affect the high sheriff, because he is the general officer of the sheriff, but I do not think that the bailiff is his general officer." But it is said here that the declaration was not

1833.

SNOWBALL
qui tam
v.
GOODRICKE,
Bart.

(a) 7 T. R. 113.

(b) 1 Ld. Raymond, 190.

1833.

 SNOWBALL
 qui tam
 v.
 GOODRICHE,
 Bart.

made in the course of the under-sheriff's duty. It was not made in the course of the transaction, but it was made while he was under-sheriff; and with respect to the bailiff—[*Denman*, C. J. The declarations of the bailiff are only admissible when they form part of the transaction. What difference is there between one agent and another?] The under-sheriff is in point of fact the principal. It is submitted that an admission by an under-sheriff, during his under-shrievalty, of matter connected with his duty as under-sheriff and done in the course of the practice of his office, regarding an act done while he was in office, is sufficient evidence to go to the jury. [*Patteson*, J. In the case of *North v. Miles* (a), declarations of a bailiff were held admissible, although not immediately connected with the transaction.]

DENMAN, C. J.—The language of Lord *Kenyon*, and also of the case in Lord *Raymond*, is strong to identify the sheriff and under-sheriff during the year; but as it is a question of considerable importance, we will take time.

Cur. adv. vult.

On the following day the judgment of the Court was delivered by

DENMAN, C. J.—We think that the rule must be discharged. We are of opinion that the declarations of the under-sheriff are insufficient to bind the sheriff, unless they appear to have been made with reference to a matter in which the under-sheriff himself is the party to be charged.

Rule discharged.

(a) 1 Campb. 389. In that case the declarations were made by the bailiff to the plaintiff's attorney, when remonstrated with for not executing the writ; and Lord *Ellenborough* held that what he said

on that occasion must be considered as part of his act touching the execution of the writ, and the declarations were admitted to contradict the bailiff's testimony.

1833.

DOE dem. BAGGALEY v. HARES and others.

EJECTMENT to recover the toll-houses and toll-gates upon the turnpike-road from Lawton to Burslem and Newcastle-under-Lyne, in the county of Stafford. At the trial of the cause before *Littledale, J.* at the Stafford spring assizes, 1832, the following facts appeared.

The lessor of the plaintiff was mortgagee of the tolls, toll-houses, and toll-gates, and the nominal defendants were the lessees of the tolls. The mortgage was by a deed-poll executed by *John Adams, R. H. Haywood, E. Wood, jun., Thomas Hulme, and R. H. Sharp*, as trustees of the turnpike; and it was proved that all these gentlemen had acted as trustees, *Haywood* for nine years, before the execution of the mortgage deed. It was requisite under the local acts relating to this turnpike trust (*a*), that a mortgage or charge upon the property should be executed by at least five of the trustees. It was contended on the part of the defendants that the mortgage was not valid, because *Haywood* had not been legally appointed, inasmuch as his appointment was not under the hands and seals of the trustees (*b*). To prove this the books of the clerk to the trustees were offered in evidence, from which it appeared that the resolution or order for *Haywood's* appointment

A mortgage executed by *A., B., C., D., and E.*, as trustees of a turnpike road, is not invalidated by shewing that *A.*, who had acted as a trustee for many years, had not been appointed under seal, as required by the local act.

(*a*) 3 Geo. 3, 23 Geo. 3, and 45 Geo. 3.

(*b*) By the act of 3 Geo. 3, trustees were nominated, and it was enacted that when any trustee should die or refuse to act, it should be lawful for the surviving or remaining trustees, or any five or more of them, by writing under their hands and seals, to elect one other person, qualified as therein mentioned, to be a trustee, in the room of such trustee so deceased or refusing to act; but that notice

in writing of the time and place of meeting for every such election should be given in the manner therein mentioned; and all persons who should be so elected were thereby invested with the same powers as the persons in whose places they should be respectively chosen. By the 23 Geo. 3, and 45 Geo. 3, additional trustees are appointed, and the same power of nominating new trustees is continued.

1833.

DOE
v.
HABES.

was signed only by the clerk of the trustees in the name of the meeting. *Campbell*, for the plaintiff, objected that these books were not admissible in evidence, and that under the General Turnpike Act it was sufficient to prove that the party acted as a trustee. The learned Judge, however, was of opinion that the entries in the books were admissible to shew how the trustees were appointed, and said, "In a common case a mortgagee could not set up his want of title, but this is a very peculiar kind of mortgage—the mortgagor is not to be personally liable. I think, therefore, it is competent to the defendants to shew that *Haywood* was not regularly appointed." The evidence having been received, his lordship nonsuited the plaintiff, but gave leave to move to set aside the nonsuit, and enter a verdict for the plaintiff. In Easter term following *Campbell* obtained a rule to shew cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff; against which

Talfourd now shewed cause. The nonsuit in this case was right. In the case of *Fairtitle dem. Mytton v. Gilbert (a)*, seven of the trustees of the turnpike roads were enabled to assign the tolls to any person who should advance money thereon. The trustees mortgaged the tolls, and also the toll-houses and toll-gates. At the trial of the ejectment for the toll-houses and toll-gates, it was argued that the act did not warrant the trustees in mortgaging the toll-gates. The judge being of that opinion, nonsuited the plaintiff. A motion was made to set aside the nonsuit, on the ground that some of the defendants having executed the conveyance, were estopped from taking that objection. *Ashhurst, J.* says, "This is a public act of parliament, and the Court are bound to take notice that the trustees under this act had no power to mortgage the toll-houses. This deed, therefore, cannot operate in direct opposition to the act of parliament, which negatives the estoppel."

(a) 2 T. R. 169.

So here, if the act of parliament has required that the appointment of trustees shall be under hand and seal, the remainder of the trustees are not estopped by his deed from saying that he was not legally appointed a trustee, and therefore not authorized to execute the deed in such character. Under the clause in the General Turnpike Act, which directs in what manner the character of the trustees is to be established in an action against them, the plaintiff was bound to prove a due appointment (a). When the trustee is named in the local act, the act is evidence of his appointment: when he is appointed by the old trustees, the order, or a copy of the order of his appointment, must be produced; and in both cases it must be proved that the party has acted as trustee. In this case, therefore, it was incumbent on the plaintiff to prove the appointment of *Haywood*, by producing the order, or a copy of the order of appointment, and it was competent to the defendants to shew the illegality of the appointment. [*Patteson*, J. In the case of *Pritchard v. Walker* (b), upon the other part of the clause, the objection was, that the party had not qualified himself by taking the oath, and therefore could not act as trustee. But it was held, that he having acted as trustee, and having been recognized as such by the plaintiff, he must be taken to be a good trustee; and the Court would not allow evidence of his not having taken the oath to be given.] The defendants are not affected by the decision in that case. There no doubt could exist as to the legality of the appointment itself; whereas here it is con-

1833.

DOE
v.
HARES.

(a) 3 Geo. 4, ch. 126, s. 134, which enacts, "that in all cases where an action shall be brought by or against any trustee or trustees, or commissioner or commissioners, of any turnpike-road, evidence of such trustee or trustees, commissioner or commissioners, having acted as such, together with the act of parliament by which

he or they was or were appointed, or the order, or a copy of the order, for his or their appointment or election, in case he or they was or were appointed or elected by the trustees or commissioners, shall be sufficient proof of his or their being trustee or trustees, commissioner or commissioners."

(b) 3 Carr. & Payne, 212.

1833.

DOE
v.
HARES.

tended that the order of appointment not being under the hands and seals of the trustees, is no order at all. [*Taunton, J.* If the construction contended for were to be put upon the act, it would enable the trustees, after obtaining the money of other people, to turn round and say that the securities executed by them were not valid, inasmuch as they were not regularly appointed. *Patteson, J.* There are clauses, I think, which go far enough to enable us to say that all acts done even by an unqualified trustee shall not be set aside. By the 64th section of the General Turnpike Act, after providing for the conviction and punishment of persons acting as trustees who are not qualified, or who are disqualified, it is said, " Provided nevertheless that no act or proceeding touching the execution of any such act, which shall be done by any such unqualified or disqualified person, previously to his being convicted of the offence before mentioned, shall be thereby impeached and rendered nugatory, but all such proceedings shall be as valid and effectual as if such person had been duly qualified."] (a) This might enable the trustees to avoid all the provisions of the act, and would cause the evils apprehended in the case of *Fairtitle v. Gilbert*.

Campbell, S. G. contra. Though the Court will not look at the hardship of a particular case, yet considerations of this nature may be some guide in ascertaining what is the meaning of the legislature. It is admitted that in this case *Haywood* was a trustee elected by the trustees. The question then is, whether the production of such an order as that which was produced at the trial is not sufficient? If an order de facto be produced, that is enough; since the object of the legislature was to prevent the requirement of nicety of proof as to the appointment of trustees in actions

(a) In an indictment for sacrilege, stating the property to have been in the custody of *A.* and *B.* churchwardens, at the Wilts spring

assizes, 1818, it was held by *Abbott, J.* that it was sufficient to shew that *A.* and *B.* had acted as churchwardens. *Res v. Mitchell*.

by or against them. By the 66th section of the General Turnpike Act it is enacted, "that where any vacancies have occurred, it shall be lawful for the surviving or remaining trustees or commissioners from time to time to elect and appoint one other fit person in the room of every trustee or commissioner dying or becoming disqualified, or refusing to act as aforesaid, without requiring that the election or appointment shall be under seal." This shews that there may be various ways in which trustees may act; and the object of the 134th section is to make the production of an order of appointment or election sufficient, whatever may be the mode of appointment directed in each particular case.

Haywood having acted nine years as trustee, the jury might have been called upon to presume that he had been legally appointed (a); and if it were shewn that the original appointment was illegal, then they might presume that a subsequent legal election or appointment had taken place. Should not this rather be presumed than that he had been acting illegally for nine years? Here an instrument was produced under the hands and seals of persons styling themselves trustees. This, together with the proof of their having acted as trustees for a long period, raises a strong *prima facie* case in favour of their being actual trustees; and it does not now lie in the mouth of the trustees themselves to take the exception to the validity of the appointment of *Haywood*; *Pritchard v. Walker* (b). If the acting as trustee for a length of time should not estop a person from saying that he is not regularly appointed, the trustees have a power of contriving to escape from their engagements at pleasure.

This case differs from that of *Fairtitle d. Mytton v. Gilbert* (c), because there the point decided was, that the act of trustees should not prevail against the powers of an act of

(a) Vide *Clarke v. Imperial Gas Company*, ante, 217, 3d. point.

(b) 3 Carr. & Payne, 212.

(c) 2 T. R. 169.

1833.

Doe

v.

Hares.

parliament. In that case there was no mode by which the property could be mortgaged.

DENMAN, C. J.—I think this nonsuit must be set aside. I am glad that the Court can come to this decision upon legal grounds, because it would be extremely hard upon parties, and very mischievous in injuring the value of securities to be given by trustees, if persons acting as trustees are not to be bound by their own acts. We think that, under the words of the 134th section, all that was necessary has been done. We may put a liberal construction upon the words of the clause. No actual appointment need be produced. The order, and proof of having acted as trustee, are sufficient. If this be not the true construction of the words of the section, then the act leaves it open to be required that the most rigid proof of appointment should be given. As to the case of *Fairtitle v. Gilbert*, the distinction is quite clear. There the question was, whether the deed would be an estoppel in contravention of an act of parliament.

LITLEDALE, J.—I am inclined to think that trustees appointed by act of parliament are not estopped from saying that a party executing a deed with others as trustees has not been legally appointed; because they do not act for themselves. But it appears to me that the clause in the General Turnpike Act does not affect this question of estoppel, but merely says what shall be evidence of a legal appointment. The first question that arises is, whether the general act, being made subsequently to the local acts, has reference to them? I think it has such retrospective effect. Then there is another question, whether the trustees shall be estopped where the order is produced, and the entry as trustee shewn, without proof of an actual appointment? I think they are, otherwise this clause would be of no avail. It appears to me, therefore, that the plaintiff is entitled to have a verdict entered for him.

TAUNTON, J.—I am of opinion that the rule should be made absolute on the 134th section simply. I will not put it on the ground of estoppel, because of the opinion thrown out in *Fairtitle v. Gilbert*. Although in the decision of that case the opinion was not necessary, yet I am reluctant to decide on the question of estoppel. The ground on which I decide is, that under the 134th clause it is sufficient proof if it be shewn that the party acted as trustee, and an order, or copy of an order of appointment or election, be produced. I think that the object of the clause was, to make it unnecessary to have a minute inquiry into the validity of the appointment, or any investigation respecting other matters, such as taking the oath or being qualified. If this be not the true construction of the clause, I think the provision would be nugatory. If the construction contended for were to be adopted, the clause would become a dead letter; because after proof of an order it would be competent to the objector to call upon the other party to proceed to prove that there was a valid election. The words I think ought to be construed, not to require a proof of regular appointment, but some proof, some *prima facie* evidence, of an appointment *de facto*. The acting for nine years would, I think, afford such *prima facie* evidence as would satisfy the meaning of the section. I think the evidence produced was quite sufficient.

1833.
DOE
v.
HARES.

PATTERSON, J.—I am entirely of the same opinion upon the construction of the 134th section. The words amount to nothing more than that where the party is not named in the act, there shall be some slight proof of appointment. Then is this act conclusive in the present case? I think it is. It means, it is true, that the order shall be such as is warranted by the local acts; but the local act in this case requires merely that the appointment itself shall be under seal.

Rule absolute.

1833.

CLARKE and others v. FELL and another.

B. a creditor of A. employs A. to repair a carriage, undertaking to pay *ready money* for the repairs; B. cannot upon offering to set off an adequate portion of the debt, require the re-delivery of the carriage without payment of the repairs.

And if A. become bankrupt either before or after the completion of the repairs, his assignees may refuse to deliver up the carriage until payment of the amount of the repairs, it not being, for this purpose, a case of mutual credit.

TROVER for a stanhope. At the trial before *Denman*, C. J., at the sittings at Westminster, after Michaelmas term last, it appeared that in April, 1831, the stanhope was sent by the plaintiffs to *Mott*, who was a coachmaker, to be repaired. At this time the plaintiffs were the holders of a bill of exchange for 24*l.* 18*s.* 6*d.* accepted by *Mott*, payable on the 19th June, 1831. In October, 1831, the plaintiffs demanded the stanhope of the defendants, into whose possession it had come as assignees of *Mott* under a commission of bankruptcy, the date of which did not appear. The plaintiffs at the same time offered to strike off from the bill of exchange, 20*l.* 13*s.*, the charge for the repairs; the defendants, however, refused to deliver up the stanhope on these terms. For the plaintiffs it was contended, that these facts established a case of mutual credit existing at the time of the bankruptcy, within 6 *Geo.* 4, c. 16, s. 50; and that the balance between the amount of the bill and the charge for repairs, was the only debt. The defendants gave evidence, that when the stanhope was sent to *Mott* to be repaired, the plaintiffs agreed to pay for the repairs in *ready money*, and that the repairs were not completed until after the bankruptcy; and they contended that the plaintiffs were bound to tender the charge for the repairs in ready money (*a*). The learned judge told the jury, that if there

(a) If the repairs had been completed before the bankruptcy, the lien of the bankrupt would have depended upon his right to receive the money in respect of which he claimed the right to detain. But it has been held both at law, (*Lechmere v. Hawkins*, 2 *Esp.* N. P. C. 626,) and in equity, (*Taylor v. Okey*, 13 *Ves.* 180,) that a creditor who borrows money of his debtor upon

an express promise to repay the amount, may nevertheless set off his original debt. In *Atkinson* and others, assignees of *Hodges v. Elliott*, 7 *T. R.* 378, *Hodges*, the bankrupt, had bought of *Elliott* two parcels of goods on credit. When the first parcel became due, *Hodges* indorsed to *Elliott* a bill exceeding the amount of the first invoice, under a promise to return the dif-

was an agreement for ready money, this was not a case of mutual credit; and that if they either thought that the bargain was such, or that the repairs were not complete till after the bankruptcy, they ought to find for the defendants. The jury being of opinion that the agreement for the repairs was for ready money, and that the repairs were not completed until after the bankruptcy, found a verdict for the defendants.

1833.

 CLARKE
 v.
 FELL.

Cleasby now moved for a new trial, on the ground of misdirection. If this was a case of mutual credit, the plaintiffs are entitled to recover the stanhope without tendering the amount of the repairs. The effect of the 50th section is to extinguish the two original debts, and create a new one, that of the balance. No more than the balance is to be claimed on either side; and the existence of a lien in respect of one claim makes no difference, because the statute merges the claim in respect of which the lien arose. In *Olive v.*

ference when received. The bill was duly paid, and *Hodges* became bankrupt before the second parcel fell due. *Elliott* was allowed to set off the excess upon the bill against the amount of the second invoice. In *Cornforth v. Rivett*, 2 M. & S. 510, which was assumpsit for goods sold and delivered, the defendant was allowed to set off money due to him upon a bill of exchange accepted by the plaintiff, of which he had become the holder after the sale, and before the delivery of the goods, although upon the purchase he had agreed to pay the plaintiff ready money for the goods. It is true, that in that case Lord *Ellenborough* says, "the plaintiff should have resisted the taking away of his goods, without ready money, which he would have a right

to do by his agreement." That, however, was not strictly a case of lien; for until delivery the property in the goods remained in the vendor, who could not be required to execute the contract by delivery, except upon the terms of the original agreement. See 2 Mann. & Ryl. 566, (d). But in *Flint, Ex parte*, 1 Swanst. 30, when *A.* being already a creditor of *B.*, advanced money to *B.*, on the deposit of a bill of exchange, *A.* undertaking to pay over to *B.* the difference between such advance and the amount of the bill when paid, and the bill was dishonoured, and *B.* became bankrupt, *A.* was not allowed to set off his original debt against the demand of the assignees for the surplus proceeds of the bill.

1833.

CLARKE
v.
FELL.

Smith, (a) *Gibbs*, J., says, "Supposing the doctrine to prevail, all the law of lien is superseded in cases of bankruptcy, because that can never arise without the question of mutual credit arising at the same time." Now this was a case of mutual credit at the time of the bankruptcy within the statute, according to the meaning of that expression, which has been settled by several decided cases. In *Rose v. Sims* (b), *Parke*, J., says, "the provision with respect to mutual credit is confined to debts between the bankrupt and other parties, or to transactions necessarily ending in debts." In the same case, *Taunton*, J., also says, "a mutual credit may be said to exist where there is a debt, or *something which will end in a debt*." This case comes precisely within these definitions of mutual credit; on the one side there was a debt upon the bill of exchange of which the bankrupt was acceptor, and the plaintiffs were holders; on the other side there was not certainly a debt, but a transaction which must necessarily end in one as soon as the repairs were complete. This is analogous to the case of goods being entrusted to a factor for sale, where there is at the time a debt due from the principal to the factor. Upon the bankruptcy of the principal previous to the sale of the goods, the factor can only be compelled to pay over the balance which is found due after the sale of the goods, upon the ground that at the time of the bankruptcy there is a mutual credit between them. *French v. Fenn* (c), *Olive v. Smith* (d).

In *Rose v. Hart* (e), in which the doctrine of mutual credit was in some degree limited, *Gibbs*, C. J., in stating the correct meaning of the term, which coincides with that before given, admitted that it extended to cases where there was a debt on one side, and on the other a delivery of property for a purpose which must in its nature terminate in a debt. The last cited case arose upon the 5 Geo.

(a) 5 Taunt. 68.

(b) 1 Barn. and Adol. 521.

(c) Cooke, B. L. 577, 6th edi-

tion, 588, 7th edition, 536.

(d) 5 Taunt. 56.

(e) 8 Taunt. 504.

2, c. 30; but the 50th section 6 Geo. 4, c. 16, corresponds with the previous enactment in this respect, except that the words "debt or demand" are made use of instead of the word "debt."

1833.

 CLARKE
 v.
 FELL.

It is immaterial that the contract was, that the repairs should be paid in ready money. The effect of that stipulation was to make the money due at the time when the repairs were finished; not to prevent the application of the provisions of the Bankrupt Act as to mutual credit. In *Demainbray v. Metcalfe*, cited by Lord Hardwick, in *Ex parte Deeze* (a), Lord Cottenham, speaking of mutual credit between the pawnor and pawnee, said that he looked upon it as an account current between the parties, to raise a case of mutual credit. It is impossible to put a stronger case of specific lien than that of pawnor and pawnee. When the goods are deposited as a pawn, it is agreed that they shall be held until the money advanced upon them be repaid. Yet the above is an authority that such an agreement does not prevent the claim from being, in the event of a bankruptcy, an item of mutual credit.

Not does it make any difference that the repairs in this case were not finished until after the bankruptcy. The only defence which the assignees could have, was, that they had a lien. If they repudiate the contract to repair, they have no defence, as nothing was due to them. If they adopt the contract, they take it with all the consequences and liabilities attached to it. *Hodgson v. Smith* (b). It is there said, "assignees may either affirm or disaffirm the contract of the bankrupt; yet, if they do affirm it, they must act consistently throughout; they cannot, as has been often observed in cases of this kind, blow hot and cold," &c. This would be an authority for the plaintiffs, supposing the agreement respecting the repairs of the stanhope, and the delivery of it, to have been made after the bankruptcy—the assignees adopting it. But as the trans-

(a) 1 Atk. 329; 2 Vernon, 691.

(b) 4 T. R. 217.

1893.

CLARKE
v.
FELL.

action was inchoate before the bankruptcy, it comes within the precise definitions of mutual credit before given, being a transaction which must end in a debt.


LITTLEDALE, J.—Under all the circumstances of the case, I think that this is not a case of mutual credit. If there had been no contract to pay in ready money, then I should say that this was a case of mutual credit, and the only inquiry to be made would be on which side the balance lay. The contract to pay in ready money makes all the difference; because the delivery might depend upon payment of the money. In *Cornforth v. Rivett* (a), which was an action for goods sold and delivered, to which a set-off was pleaded, Lord *Ellenborough* said, the plaintiff should have resisted the taking away of his goods without ready money, which he would have had a right to do by his agreement. In this case the bankrupt might have insisted upon retaining the stanhope until payment of the charge for the repairs was made in bank notes or sovereigns, and the assignees may therefore do the same. The other question, then, does not arise, viz. supposing this to be a case of mutual credit, whether it makes any difference that the work was not completed until after the bankruptcy. In my opinion, if the assignees choose to go on with the contract, they must adopt it with all its consequences.

TAUNTON, J.—I am of the same opinion. I think that there was no misdirection, and that the verdict was right. There is one incidental point to which I would refer. It has been said by Mr. *Cleasby*, that there was an offer on the part of the plaintiff to deduct the amount of the repairs of the stanhope from the amount of the bill of exchange. That offer of set-off is different from an offer to pay ready money. If ready money had been offered, the subsequent detainer would have been wrongful. As

(a) 2 M. & S. 510, ante 245, n.

to the general question, whether this is a case of mutual credit; for some purposes, and in some sense of the words, mutual credit was given. If the plaintiff had gone before the Commissioners to have proved his debt on the bill of exchange, it would have been competent for the assignees to say that a debt was due from the plaintiff to the bankrupt, and to reduce the proof of the plaintiff to the exact balance. Had this been done, the lien would have been destroyed. In this way, this is a case of mutual credit. The question then arises, whether the bargain to pay in ready money is annulled by the bankruptcy. The jury having found that the agreement was to pay in ready money, the bankrupt had a lien on the stanhope, which continued until ready money was paid, and to the benefit of that contract made by the bankrupt his assignees are entitled. As to one of the cases cited, *Rose v. Hart*, all that was decided in that case was, that the defendant who claimed a general lien, had no right to retain the goods of the bankrupt from his assignees, for the general balance of his account. That case is very different from this. The lien claimed here is a specific common law lien, not a general lien.

PATTESON, J.—I am of the same opinion. It was found by the jury, that there was an agreement to pay in ready money. If there had been no bankruptcy, the bill for the repairs must have been paid before the return of the stanhope could have been compelled. This is quite clear, from the case of *Cornforth v. Rivett* (a). This is not a question of set-off, but of mutual credit, *Buchanan v. Findlay* (b). I agree with Mr. Cleasby, that to constitute a case of mutual credit, a debt, or that which will eventually terminate in a debt, must exist between the parties; but I know no case in which it has been decided that a bank-

1833.

 CLARKE
 v.
 FELL.

(a) 2 Maul. & Selw. 510, ante
 245.

(b) 4 Mann. & Ryl. 593; 9
 Barn. & Cressw. 738.

1833.
 CLARKE
 v.
 FELL.

ruptcy destroys a particular lien. I ground my opinion entirely on the circumstance that the contract to repair the stanhope was, that the amount should be paid in ready money.

Rule refused (a).

(a) And see *Fair v. M'Iver*, 16 East, 130, 138; *Peele v. Northcote*, 7 Taunt. 478.

STOVIN v. TAYLOR.

A plaintiff arresting a defendant under a misapprehension of a doubtful point of law, is not liable to pay the defendant his costs, under 43 *Geo. 3*, c. 46, s. 3.

ASSUMPSIT by the drawer against the acceptor of a bill of exchange. The defendant had been held to bail for the sum of 28*l.* upon an affidavit of debt, stating that so much money had been paid by plaintiff to defendant's use. The declaration contained a count on the bill of exchange, and the common money counts. By the particulars of demand annexed to the declaration, it appeared that the action was brought for 12*l.* 12*s.*, the amount for which the bill of exchange was drawn and accepted; and for 15*l.* 8*s.*, being the costs paid by the plaintiff in an action brought against him, as drawer, by an indorser of the same bill of exchange, in consequence of its having been dishonored by the defendant. At the trial before *Denman*, C. J., at the sittings after Michaelmas term last, the counsel for the plaintiff admitted at the outset of the cause, that the amount of the bill only could be recovered; and a verdict for the sum of 12*l.* 12*s.* was taken accordingly.

Upon an affidavit stating the above facts,

Butt now moved for a rule, calling on the plaintiff to show cause why the defendant should not be allowed his costs of suit, to be taxed by the master, pursuant to the third section of 43 *Geo. 3*, c. 46. The drawer of a bill of exchange not being able to maintain an action against the acceptor for the costs of a suit against him occasioned by the dishonor

Whether drawer may sue acceptor for costs of action against former.

of such bill, this case comes within the operation of the statute; *Dawson v. Morgan* (a). [*Patteson*, J. In that case the action was brought by an indorser against the acceptor. Between these parties there is no privity.] But the principle is the same in both cases, as the drawer is bound to pay in default of acceptance, and the acceptor is only liable for the amount of bill and interest, and not for costs, to which the drawer has subjected himself through his own neglect. [*Taunton*, J. This is an application to the Court, upon the ground that there was want of probable cause for the arrest. Surely a mistake in law is not a sufficient ground for granting this application. I am not sure that the costs might not be recovered by the drawer, against the acceptor, as unliquidated damages.] The plaintiff does not sue specially, but merely on the bill of exchange; and there is no authority to shew that the costs of the action could be recovered (if at all) as unliquidated damages. The case of *Gompertz v. Denton* (b), argued in the Court of Exchequer, is an authority, that where a plaintiff holds a defendant to bail without having a legal right so to do, this case is within the statute. In the present instance, the plaintiff had no legal right to arrest for the amount in question, and the defendant is entitled to his costs.

Per Curiam.—We cannot say that in this case there was an absence of probable cause of arrest.

Rule refused (c).

(a) 9 Barn. & Cressw. 618; and see *Jones v. Brooke*, 4 Taunt. 464.

(b) 1 Crompton & Meeson, 207.

(c) And see *Donlan v. Brett*, 5 Mann. & Ryl. 39, and 10 Barn. &

Cressw. 117; *Day v. Picton*, 5 Mann. & Ryl. 31, and 10 Barn. & Cressw. 120; *Longridge v. Dorville*, 5 Barn. & Alders. 117; *Kemp v. Burt*, post; *Roper v. Sheasby*, 1 Crompton & Meeson, part 3.

1833.

The KING v. The Justices of SOMERSET.

The authority of justices under 10 *Geo.* 4, c. 6, to inquire whether the tables of payments and benefits in friendly societies can safely be adopted, does not extend to societies instituted before the passing of that act.

THE friendly society of Marksbury and Stanton Prior, was instituted in the year 1781, and in 1794 the rules were inrolled at the Quarter Sessions held at Wells, for the county of Somerset, pursuant to the 33 *Geo.* 3, c. 54. s. 2. Since the passing of the 10 *Geo.* 4, c. 56, the society has, under the 39th section, thought fit to conform to the provisions of that act. On the 31st September last the rules were accordingly amended, and duly certified by the barrister appointed to certify the rules of Savings Banks, and were left with the clerk of the peace to be laid before the quarter sessions, in order that they might be inrolled and confirmed pursuant to the late act. The Court of Quarter Sessions refused to inrol and confirm the rules, because they considered that the provision contained in the 6th section of 10 *Geo.* 4, c. 56, is one of those to which old societies are, by the 39th section, required to conform; and were of opinion that the proposed tables of payments and benefits could not be adopted with safety to all parties concerned.

In Trinity term last *Tidd Pratt* obtained a rule, calling upon the justices for the county of Somerset to shew cause why a mandamus should not issue commanding them to inrol and confirm these rules, against which

Erle now shewed cause. The 6th section, though in terms it applies only to societies which should be instituted after the passing the act, yet by the operation of the 39th and 40th clauses is extended to old societies conforming to the 10 *Geo.* 4, c. 56. The 39th section enacts, "that this act shall extend to all friendly societies hereafter to be established, and also to societies already established, as soon as they shall think fit to conform to the provisions thereof;" and the 40th section declares, "that old societies not conforming within three

years after the passing of this act, shall cease to be entitled to the privileges and provisions of the former statutes," which are repealed by the first clause; but by the 40th directed to remain in force for three years, or until such time as the old societies shall conform. All the former sections, from the 1st to the 39th, (with the exception of the 6th) though in terms relating exclusively to societies to be established, are held to extend to societies already established. The 6th clause, it is now contended, is not touched by the 39th. It enacts, "that no rules of any society hereafter to be formed shall be allowed, unless it shall appear to the justices, to whom the same are tendered, that the tables of the payments to be made by the members, and of the benefits to be received by them, may be adopted with safety to all parties concerned. The question is, whether, in the case of new rules made by societies established before the act, the magistrates at their quarter sessions are merely to act ministerially in inrolling and confirming the rules, or to have a discretionary power to refuse to inrol, when they think the tables cannot be adopted with safety. By the 4th section, which it is admitted applies to the case of old societies, it is required that the rules of any society, after having been certified by the barrister, shall be deposited with the clerk of the peace, and by him laid before the justices at the next general quarter sessions, and the justices are authorized and required to allow and confirm the same; and the clerk of the peace is then to file them on the rolls of the sessions, and sign a certificate of the inrolment. If it had been intended that the magistrates should have no discretion, the act would have authorized the clerk of the peace to inrol in the first instance, and would not have required the rules to be first given to him to be laid before the sessions, and thence to be returned to him for inrolment. In all the acts, the legislature has relied much upon the wisdom of the justices in deciding whether rules can be safely adopted or not.

1833.

 The KING
 v.
 The JUSTICES
 OF SOMERSET.

1833.

The KING
v.
The JUSTICES
OF SOMERSET.

Tidd Pratt, contra. The 6th clause was not intended to apply to old societies. Somerset and Middlesex are the only counties in which the magistrates have supposed the 6th section gave them jurisdiction over the rules of old societies. The first act was passed in 1793 (*a*), and from that period until the year 1819, when Mr. *Courtenay's* act (*b*) passed, there was no power of interference on the part of the magistrates with respect to the tables. By the last-mentioned act a jurisdiction was given which has been since found inconvenient; and in 1829, the act of 10 *Geo.* 4 (*c*) passed, by which the power which the magistrates possessed under the preceding act was given to the barrister. When the present bill was first introduced into the house it did not contain the 6th clause, which was added subsequently. [*Denman*, C. J. I think we cannot hear that.] If the words "hereafter to be formed," had not been inserted in the clause, the case would have been different.

DENMAN, C. J.—I believe we are all of opinion that the magistrates have not the power of refusing to enrol the rules, because they think the tables not good.

Rule discharged.

(*a*) 23 *Geo.* 3, c. 54. (*b*) 59 *Geo.* 3, c. 128. (*c*) 10 *Geo.* 4, c. 56.

SAVILLE, and JOYCE his Wife, v. SWEENEY.

Action does not lie at the suit of husband and wife for words slandering the wife in a trade carried on by her, it not being alleged that she was divorced *a mensâ et thoro*, or had a separate maintenance.

CASE for slander. The first count of the declaration, after the usual inducement of good character, averred that the plaintiff *Joyce* carried on the trade of a boarding-house keeper, and for the purpose of carrying on such business occupied a boarding-house; that she had acquired credit

alleged that she was divorced *a mensâ et thoro*, or had a separate maintenance.

with one *Hewitt* and others, and had been supplied by them with necessaries for conducting her business, by means of which she acquired profit; but that the defendant contriving and intending to cause her to be suspected of adultery, and to prevent her from carrying on the said boarding-house, in a conversation with one *Pardy* of and concerning her in the way of her business, spoke of her, of and concerning her business, the following false words: "Oh that vile woman, her passionate and general conduct is so disgusting she has driven all the ladies out of the house—you had better get rid of her—I have always paid the rent."

The second count was similar to the first, except that the scandalous words were, she "is a whore—she is a prostitute—she is common."

The third count was similar to the first, except that the words were, "she is committing adultery with that man in the next room."

The fourth count was also similar to the first, except that the words were, "she is a whore—she is common."

The fifth count was similar to the first, except that the scandalous words were, "I have seen Colonel *H*—go into her room, she is a whore—she is common."

The sixth count was also similar to the first, except that the words were, "you will never get your money, for I have lent her several pounds, and have supported her some time."

The seventh count was similar to the first, except that the scandalous words were, "she left London and has not paid her tradespeople there, not even her servant. You are very foolish to trust her."

The conclusion to these counts stated, as special damage, that by reason of the premises *John Hewitt* and others had refused to supply *Joyce* with necessaries upon credit. There was a second set of counts, which stated special damage, and the same scandalous words, but varied from the preceding counts in stating that the plaintiff *Joyce* lived separate from her husband.

1833.
SAVILLE.
v.
SWEENEY.

1833.

 SAVILLE
 v.
 SWEENEY.

A third set of counts stated that *Joyce* lived apart from her husband, and had sustained special damage, but stated the scandalous conversations differently.

A fourth set of counts, without stating that *Joyce* lived apart from her husband, stated substantially the same scandalous matter, and stated as special damage, that her friends had not provided her with necessaries, as they before that time had been accustomed to do.

At the trial of this cause at the Hampshire spring assizes in 1832, before *Park, J.*, it was objected that the wife should not have been a party to the action. The learned judge told the jury that the wife was properly joined. A verdict was found for the plaintiff on the first and third sets of counts, damages 100*l.* In Easter term 1832, *Follett* obtained a rule nisi to enter a nonsuit, or in arrest of judgment, against which

Bompas, Serjeant, and Sewell, now shewed cause. 1. As to the nonsuit applied for. This is a question arising upon the record only, and therefore is not matter of nonsuit. The scandalous words stated in the declaration are actionable of themselves, because they are spoken of one of the plaintiffs in the way of her trade; *Seaman v. Bigg* (a), *Terry v. Hooper* (b). In *Wharton v. Brook* (c), words spoken of a midwife in the relation to her trade, were held actionable. The rule with respect to the joinder of the husband and wife in actions is this, that wherever the wife is the meritorious cause of action, she must be joined. This appears from a number of cases; *Brashford v. Buckingham* (d), *Pratt and Ux. v. Taylor* (e), *Weller v. Baker* (f), *Philliskirk v. Pluckwell* (g), *Fountain v. Smith* (h), *Dunstan and others v. Burwell and others* (i). Here, the

(a) Cro. Car. 480.

(b) 1 Lev. 115.

(c) 1 Ventris, 21.

(d) Cro. Jac. 77, 205.

(e) Cro. Eliz. 61.

(f) 2 Wils. 424.

(g) 2 M. & S. 393.

(h) 2 Siderf. 138.

(i) 1 Wils. 224.

damage was sustained by her alone. She was living separate from her husband, and the words are alleged to have been spoken of her in relation to her business; and the damage is laid to have been to her alone in her business.

In *Russell v. Corne* (a), which was an action brought by husband and wife for the battery of the wife, and there was one count for beating her, *per quod negotia ipsius* (of the husband) *infecta remanserunt*, and which concluded *ad damnum ipsorum*, the Court refused to arrest the judgment. *Holt*, C. J. there also stated, that in the case of *Coleman v. Harcourt* (b), the special damage was laid as having been sustained by the husband. In the present case the wife is alleged to have sustained the damage. In all actions of tort, of assault and battery of the wife, and of slander, where the words are actionable of themselves, the wife must join. The Courts went so far at one time, as to decide that where a wife was divorced *a mensâ et thoro*, she might sue alone; *Ex parte Green* (c), and *Ringstead v. Lady Lanesborough* (d). Suppose the wife had been the servant, and had carried on the boarding-house for a stranger, and words were spoken of her in consequence of which the business was prevented from being carried on, and she herself lost her situation, the husband and wife might maintain an action without stating special damage. In this case, the whole damage relates to the personal suffering of the wife. No injury has been sustained by the husband. If this case had gone to the jury in the name of the husband only, it would have been represented to them that the husband had sustained no injury; and although the jury would have been directed to find for him in the same manner as they would have done if the wife had been joined, they would have given but small damages. If a wife were not to be joined in a case of personal injury to herself, the consequence would be, that her whole remedy

1833.

SAVILLE
v.
SWEENEY.

Battery of
wife.

Divorce a
mensâ et thoro.

(a) 2 Ld. Raymond, 1031; S. C.
1 Salk. 119.

(b) 1 Levinz, 140.

(c) Cooke's B. L. 6th edit. 315.

(d) Cited in *Corbet v. Poelnitz*,
1 T. R. 5.

1833.

SAVILLE

v.

SWEENEY.

would be little more than nominal, as no jury would give large damages to the husband alone.

Follett, contra. Leave was given to move either in arrest of judgment or for a nonsuit; and the reason why the rule was taken in the alternative was, that it was said that the special damage made these words actionable, and no special damage was proved at the trial. For the purpose of arresting the judgment, it is immaterial whether there was or was not special damage, the question being whether the action is maintainable in its present shape by the husband and wife. It is clear that no action would lie simply for the speaking of these words, for they are not actionable in themselves. Upon this point it is not necessary to trouble the Court with authorities. But it is said that these words are actionable, because they are spoken of the plaintiff in her trade. In an action for words spoken of a plaintiff in the way of his trade, it is unnecessary to prove special damage, pecuniary loss being supposed to follow from injurious words so spoken. The pecuniary loss in this case is an injury exclusively to the husband, as the business belongs to him. With regard to the particular special damage stated in the third set of counts, that the wife was deprived of her necessary food, that was not proved; and if it had been so, that would not make the action maintainable in her name, for, as there has been no divorce, it is the husband's duty to supply his wife with necessaries. It is said that the wife is the meritorious cause of action, because the words were spoken of her, but that does not make her so. The cases in which the wife has joined as the meritorious cause of action are cases in which there had been an *express promise* to the wife. This distinction is laid down in Selwyn's N.P. 275, where it is said, although the law will not imply a promise to the wife, yet where the wife is the meritorious cause of action, that is, where the defendant has derived profit or advantage from her labour or skill, and an *express promise* of remuneration is made by the defendant to

Express promise to wife, being meritorious cause of action.

the wife, if in such case an action is brought by the husband and wife jointly, and it is expressly stated in the declaration that the promise was made to the wife, an objection cannot be raised to such declaration, merely on the ground of the wife having been joined. And the case of *Brashford v. Buckingham* (a) is there cited as an authority. In this case words alone are all that relates to the wife, the whole special damage, which must be the gist of the action, is sustained by the husband alone; and therefore the wife cannot join. *Coleman v. Harcourt* is precisely in point. In *Russell v. Corne* it was held, that where husband and wife joined in an action maintainable by both, the statement of special damage to the husband alone went merely in aggravation of damages, and did not make the joinder of the wife improper: Buller's *Nisi Prius*, 21 a. Several other authorities are collected in the last edition of Bacon's *Abr.* vol. i. p. 733, from which it appears that where the words are not in themselves actionable, the husband and wife cannot join. Nothing in this record shews that the wife had any separate interest in the products of her trade. Formerly it was said, that under certain circumstances the wife could sue and be sued alone; but that was over-ruled in *Marshall v. Rutton* (b). And in *Boggett v. Frier* (c), it was determined that the wife could not sue as a feme sole; *Lewis v. Lee* (d).

LITLEDALE, J.—It appears to me that in this case the rule for an arrest of the judgment ought to be made absolute; and therefore it is not necessary to say any thing concerning the nonsuit. The declaration states that the wife was living separate and apart from her husband, that she was conducting a boarding house, and that the words were spoken of her in that character. In the first place, with regard to these words, though they might have the effect of injur-

(a) Cro. Jac. 77, 205.

(b) 8 T. R. 545.

(c) 11 East, 301.

(d) 5 Dowl. & Ryl. 98; 3 Barn. & Cressw. 291.

1833.

SAVILLE

v.

SWEENEY.

ing her in her trade and business, yet it does not appear to me that they were spoken of, or that they are applicable to, her trade and business. These words then require special damage to make them actionable, but if there be any special damage it was sustained by the husband. It does not appear that the parties were separated by divorce, or that the wife had a separate maintenance. But I do not rest upon this ground, for even if she had been divorced *a mensâ et thoro* the special damage would be to the husband. Therefore, in point of law the cause of action refers to the husband and not to the wife. In one of the cases quoted by Mr. Follitt the wife lived separate and apart from her husband, yet it was held that the action must be brought in the name of the husband. I should say, generally speaking, that a married woman could not receive an injury as special damage in respect of words spoken. Supposing the wife had been living in the house and it had been broken open, the action for the trespass would have been brought in the name of the husband. Here the wife was acting as agent to her husband, and to him, therefore, all the profits of the business must be considered to belong. I see nothing more than agency; and the words are not actionable in themselves.

Wife, where
meritorious
cause of ac-
tion.

With regard to what is said as to the wife's being the meritorious cause of action, she may be the groundwork of the cause of action, and yet not necessarily constitute the meritorious cause of action. This case is different from that of the Dippers of Tonbridge Wells, as there the wives had a species of vested interest.

TAUNTON, J.—There seems to have been some difficulty in ascertaining upon which counts the verdict was taken. My attention has not been directed to any difference in the counts; and if anything should turn on that, I must be considered as not delivering any opinion. It strikes me that the judgment must be arrested on this short ground. The doctrine, with respect to the joinder of the wife with

the husband in an action, I apprehend to be this. If a personal wrong be done to the wife, as by beating or imprisoning her, and the personal suffering is to the wife, then she may join with her husband, and it is not less the action of the wife because the husband inserts a statement of special damage to himself; *Russell v. Corne* (a). But where there is no particular cause of action in the wife, and the right of action would not survive to her, but the gist of the action is the damage to the husband alone, she ought not to be joined; *Coleman v. Harcourt* (b). Here it is stated on the record, that the wife was living separate from her husband, and was carrying on business as a boarding-house keeper. I apprehend that a married woman is incapable of carrying on business upon her own account, except through the intervention of trustees. The business was, in point of law, the husband's, and therefore the loss of credit and of custom was a pecuniary loss to the husband. The wife has no substantive cause of action upon the facts stated on the record, and therefore I think the judgment must be arrested. I would not be understood to say that the action could be maintained by the husband alone—that is another question.

1833.

 SAVILLE
 v.
 SWEENEY.

Trading by
 married woman.

PATTESON, J. — I am entirely of the same opinion. The words are not actionable in themselves, but only upon proof of special damage. I do not say that under the circumstances stated in the declaration, the husband alone could maintain an action; but I think it quite clear that upon the facts there stated the action is not maintainable by the husband and wife jointly. I therefore think that the judgment must be arrested.

DENMAN, C. J.—I have not heard the whole of the arguments, but it appears to me perfectly clear that under the circumstances judgment ought to be arrested.

Judgment arrested.

(a) 1 Salk. 119.

(b) 1 Lev. 140.

1833.

KEMP v. BURT and another, Gents. two &c.

An attorney is not liable for the consequences of a mistake in a point of law, upon which a reasonable doubt may be entertained.

THIS was an action against the defendants for negligence as attorneys. At the trial of this cause at the Spring Assizes, 1832, for the county of Surrey, before *Tindal*, C. J. the following facts appeared. In April, 1828, some cows and sheep of the plaintiff being found on the turnpike road, in the parish of Hawley, in the county of *Surrey*, by *Silvester*, the surveyor of the highways, were seized by him and his two assistants, and impounded in the common pound of the same parish. The cows and sheep escaped out of the pound, and the two cows returned home, but the sheep were again impounded in the county of *Sussex*, at Wath, a parish adjoining to Hawley. From this pound the plaintiff obtained their release from the pound-keeper, upon a promise to pay the poundage, and drove the sheep into one of his own fields in the county of Surrey; thence they were taken by the surveyor and again impounded. They remained in this pound until the 3d of May following, and were then sold to pay the poundage. The then and now plaintiff applied to the present defendants, as his attorneys, to bring an action against the surveyor for this trespass, and on the 2d of May, a latitat, returnable on the first day of the ensuing term, was accordingly sued out against *Silvester*, the surveyor. In November, 1828, a copy of the præcipe was laid before counsel to prepare declaration, but no direction whatever was given as to the venue. The declaration was drawn, and the venue laid in *Sussex*. At the foot of the declaration the counsel by whom it was drawn wrote the following opinion. "I think it would have been prudent to have issued the writ against *Silvester's* two associates, and joined them in the action, as they were clearly co-trespassers with him, and their evidence therefore must be anticipated in his favour, and will be likely to be extremely prejudicial to the plaintiff." In consequence of this opinion the now defendants had an inter-

view with the plaintiff, and it was agreed that another action should be commenced against *Silvester* and his two assistants *Town* and *Mercer*. The first action was accordingly discontinued, and another latitat, returnable on the first day of Hilary Term, 1829, was issued against the three. The defendants in that action intended to set up as a defence, that under the 3 *Geo. 4*, c. 126, s. 147, and 4 *Geo. 4*, c. 95, s. 75, the action should have been brought within three months, and that the venue was local, and should have been laid in Surrey. Upon this the now defendants took the opinion of a special pleader, who was of opinion that the action was well brought and the venue properly laid. The cause came on to be tried, when the learned judge who presided at the trial directed the plaintiff to be nonsuited, on the ground that under the General Turnpike Acts before cited, the action was neither brought in due time nor the venue rightly laid; but leave was given to the plaintiff to move to enter a verdict for 5*l.* 10*s.* In the following Michaelmas Term a rule nisi was accordingly moved for by *Gurney*, which the Court refused to grant. At the trial of the present action, the learned judge directed the plaintiff to be nonsuited, and gave the plaintiff leave to move to enter a verdict for £— damages. In Easter term last *Thesiger* obtained a rule nisi to enter a verdict for the plaintiff, according to the leave reserved, against which

1833.

 KEMP
 v.
 BURT.

Platt and *Channell* shewed cause. The rule should not not have been granted in this form. The amount of the damages ought not to have been mentioned, as the effect of it is to withdraw from the jury the consideration of the question as to the amount of the verdict. The action could not be maintained because this is not a case of gross negligence. An attorney is bound to bring to a cause skill, care and integrity, but he is not liable for every error in judgment. The declaration in the first instance was drawn by counsel, and all the facts which were requisite

1833.

KEMP

v.

BURT.

were stated to him. It was in consequence of the opinion of counsel that the first action was discontinued. The declaration is again laid before counsel, and he finds no fault with the venue. Was the attorney, after this, to alter the venue? It may be contended that the venue was well laid, as in trespass, since the continuation of the act complained of may be treated as a new trespass. After the doubt as to the venue and time of bringing the action had been suggested to the defendants, they took the opinion of an eminent pleader, whose opinion was favourable. There was reasonable cause for doubt, on the part of the attorney, as to whether the second taking was within the Highway Act. The question arose upon 3 *Geo.* 4, c. 126, which act was found so imperfect, that in the following year a supplemental act (a) of 132 sections was passed to explain and amend it. The limitation as to time was in the former act, the provisions as to the seizure were in the latter.

The counsel for the defendants were here stopped by the Court, who called upon

Thesiger, contra. An attorney ought to make himself acquainted with the acts of parliament upon which he is about to institute a suit. It was the duty of the attorney, when he laid instructions before counsel, to have pointed out the particular clauses in the act of parliament as to the venue, and the period of time within which the action was to be brought. The attorney sent instructions to counsel, headed "Sussex Latitat." The attorney sued out the latitat on his own judgment (b). The action was discontinued without the advice of counsel, and upon the attorney's own responsibility. This is unlike the case of *Baiker v. Chandless* (c). There it was doubtful whether the action should be brought within three months. Here, the limitation as

(a) 4 *Geo.* 4, c. 95.

(b) The latitat would issue into the county where the defendant was likely to be found, without

reference to the county in which the venue was intended to be laid.

(c) 3 *Campb.* 17.

to time is in express terms. The taking the opinion of counsel will not protect an attorney; *Godefroy v. Jay* (a).

1833.

KEMP
v.
BURT.

DENMAN, C. J.—I cannot conceive that this is a case of gross negligence on the part of the attorney. It cannot be said to be gross negligence to have sued only one individual in the first instance, and after the advice of counsel had been taken, in pursuance of that advice to discontinue that suit, and bring an action against three individuals. A reasonable doubt might be entertained as to whether the second taking was within the protection of the statute.

LITLEDALE, J.—There is here no case of gross negligence. The words of the act are such that the attorney might suppose that the second taking was not protected by the statute, and if the taking was not within the meaning of the act of 4 Geo. 4, s. 137, the limitation as to time was not applicable. The learned Chief Justice, who tried the cause, seems to have doubted on the points.

TAUNTON, J. concurred.

PATTESON, J.—The only doubt I had was, whether the attorneys were justified in discontinuing the first action. The way I get over the difficulty is this,—it was doubtful whether the taking was within the protection of the statute; and if the seizure was not protected by the act, there was no particular limitation as to the time within which the action should be brought.

Rule discharged (b).

(a) 1 Moore & P. 236; 6 Bingham 616.

(b) And see *Montrion v. Jeffery*,

Ryan & Moody, 317; 2 Carr. & Payne, 113, S. C.; *Stovin v. Taylor*, ante, 250.

1833.

THOMPSON v. HENRY BLACKHURST and others.

A judgment of a county court is not conclusive. The existence of the facts necessary to the regularity of such judgment is a question for the jury, although a motion made in the county court to set it aside for irregularity have been dismissed.

TRESPASS. The first count of the declaration was for entering the dwelling house of the plaintiff, and seizing his goods. Second count, *de bonis asportatis*. Plea: first, general issue; secondly, (as to the whole of the declaration), *actio non*, because before the said time when &c. to wit, on the 2d January, 1832, a certain suit was commenced by one *William Blackhurst* and the said *Henry Blackhurst*, in the county court of the sheriff of the same county of Lancaster, holden at Preston, against the plaintiff, for a certain cause of action which had before then occurred within the jurisdiction of the said court, and such proceedings were thereupon had, that the said *W. Blackhurst* and *H. Blackhurst*, by the consideration and judgment of the said court, recovered against the plaintiff a certain debt of 9*l.* 19*s.* 11*d.* and also 3*l.* 6*s.* 5*d.* which by the said court were adjudged to the said *W. B.* and *H. B.* for the damages which they had sustained on the occasion of the detention of that debt; whereof the plaintiff was convicted; as by the proceedings in the said suit still remaining in the said county court of the said sheriff, more fully and at large appear; and the said judgment being in full force and effect, and the said debt and damages wholly unpaid and unsatisfied, the said *W. B.* and *H. B.* for having execution thereof, to wit, on &c. sued and prosecuted out of the said county court of the said sheriff of the said county of Lancaster, holden &c. a certain process of execution called a levy (a) upon the said

(a) The ordinary process of execution at common law is a *distringas ad satisfaciendum*. In county courts, to which the statutes giving process by *feri facias*, *elegit*, and *capias ad satisfaciendum*, do not apply, the execution is still by *distringas*, except in those counties in which, by immemorial cus-

tom, the sheriff is authorized to award a *levari facias*. *Vide Com. Dig. Copyhold, R. 18; ib. tit. Courts C. 10, 13.* In the present case, the plea does not state any such custom; but no exception appears to have been taken on the ground of this omission. In the superior courts, the writ of

judgment, by which the said court commanded the bailiff of the hundred of —, and also *Thomas Toach, Charles Norris*, two of the defendants, and one *John Cooke*, that they, or some of them, should cause to be levied of the goods and chattels (b) of the said plaintiff, the debt and damages aforesaid, and that they should have that money at the next county court to be holden for the said county, to render to the said *W. B.* and *H. B.* for the debt and damages aforesaid; which process afterwards, and before the return thereof, to wit, on &c. at &c. was delivered to the said *Thomas Toach*, in due form of law, to be executed. Under this process of execution, *Thomas Toach* and *Charles Norris* justified as bailiffs, and *James Poole* as their servant.

1833.

 THOMPSON
 v.
 BLACKHURST.

Replication, de injuriâ suâ propriâ absque tali causâ; whereupon issue is joined.

At the Lancaster Spring Assizes, 1832, this cause came on for trial before *Patteson, J.* when the following evidence was given. On the 8th of August, 1826, a justices issued to the sheriff of Lancaster, authorizing him to entertain a suit between *W. B.* and *H. B.*, and the present plaintiff, for 9*l.* 19*s.* 11*d.* The justices plaint-book of the sheriff of Lancaster was produced, which contained the following entry: "Lancashire to wit, the 11th county court of *P. E. Towneley*, esquire, sheriff of the said county, holden at &c. on Tuesday the 22d November, 2 W. 4, and A. D. 1831.

"Before *T. B. Addison* and *J. Addison*, esquires, suitors, 10th Dec. 1831.

Distringas is never resorted to after a judgment, except upon a recovery in detinue, when, for the purpose of obtaining possession of the specific chattels, successive writs of Distringas ad deliberandum may issue until the property is restored. See *Keilwey*, 64 b; *Towns. Judgm.*

82, &c.; 1 *Rol. Abr.* 737, l. 38; 9 *Vin. Abr.* 440; *Mann. Ex. Pract.* 1st ed. 439; *Ibid.* App. 299.

(b) By special custom, the issues of the lands may be taken under a *levari facias de terris et catallis*, 2 *Lutw.* 1413; the ordinary *levari* is de catallis only.

1833.
 THOMPSON
 v.
 BLACKHURST.

"Henry Blackhurst, and
 William Blackhurst,
 Gents., two &c. in person,
 Complainants,

} v. John Thompson,
 Debt, 9l. 19s. 11d.

Defendant appears by T.
 Ellis, 2d January, 1832.
 Saith nothing. Sameday
 granted levy for debt and
 9l. 6s. 5d. costs. To
 levy for 9l. 18s. and
 costs. Bailiffs: Toach,
 Norris, and Cook."

Practice of
 county court
 of Lancashire.

It was stated that the practice of the county court is, that when the under-sheriff receives the writ of Justices, he issues a warrant directed to the bailiffs, commanding them to attach the defendant by his goods, to compel him to appear at the next county court to answer to the plaintiff; and that the warrant is delivered by the under-sheriff to the plaintiff's attorney, who then makes a copy of the warrant and instructs one of the bailiffs to whom it is directed to serve a copy upon the defendant. The bailiff claims from the defendant 2s. 4d. for entering an appearance for him; and the payment of the 2s. 4d. is considered as an authority for that purpose. If the 2s. 4d. be not paid by the defendant, the bailiff attaches the defendant's goods until the defendant enters an appearance by attorney. No evidence was given of the warrant having been issued, or of the payment of the 2s. 4d. to T. Ellis, whose name was entered on the plaint-book as appearing for the defendant; but it was contended that the proceedings in the county court should be presumed to be regular; and it was shewn on the part of the defendant that a motion to set aside the proceedings in the county court for irregularity had been dismissed. The learned judge was of opinion that the defendants had not made out their justification; but he left it to the jury to determine whether a warrant had ever been served on the defendant or the 2s. 4d. paid by him. The jury found both these facts in the nega-

tive, and returned a verdict for the plaintiff. The learned judge gave leave to the defendant to move for a new trial, on the ground of misdirection, and reserved to the plaintiff any advantage he might have by reason of any defect in the defendant's plea. In Easter term last *Archbold* obtained a rule nisi for a new trial, against which

1833.

 THOMPSON
 v.
 BLACKHURST.

F. Pollock and *Wightman* now shewed cause. The practice of the inferior court could not be lawful which enables a plaintiff to obtain judgment and execution without the knowledge of the defendant, as would be the case here if it were unnecessary to prove the serving of the warrant, or the authority to appear, signified by payment of the 2s. 4d. In the administration of justice, it is important to bear in mind that what is satisfactory evidence at one time, may not be so at another. Here, five years had elapsed between the issuing of the justicies and the entry of the plaint. The dates exciting so much suspicion, the jury might well require proof of the regularity of the proceedings; and as no such proof was given by the defendant, they were warranted in presuming that these proceedings were not regular.

The special plea states that a suit was commenced by *Blackhurst* in 1832, and that a debt of 9l. 19s. 11d. was recovered. The county court had no jurisdiction over debts above the amount of 40s. The proceedings of the county court are therefore, upon the face of the plea, irregular. [*Littledale, J.* That is only ground of demurrer]. The Court will not presume a justicies in this case. The county court has two jurisdictions, ordinary and extraordinary. This extraordinary jurisdiction is that which the Court has over debts above 40s. and is founded upon the writ of justicies. There are several cases to shew that when a defendant justifies under process issuing out of an inferior court, the jurisdiction of the inferior court ought to be set forth. In *Moravia v. Sloper* (a), *C. J. Willes* says, "In all the cases

Jurisdiction of
county court.

(a) *Willes*, 37.

1833.

THOMPSON

v.

BLACKHURST.

Process not re-
turned.

that I can find where these sort of pleas have been holden to be good, they have expressly set forth what jurisdiction the court had, to shew that the court had a general jurisdiction of such sort of actions;" *Dennis v. Rowls and another* (a), and *Jones v. Moldrin* (b). There is likewise another objection. It is not shewn that the process in this case was returned; *Middleton v. Price* (c). This is not the case of justifying under process by an officer of the court who is entitled to great latitude in pleading, but it is a justification by one of the plaintiffs in the original suit, who is bound to plead every circumstance strictly. If the defendant, upon a new trial, should obtain a verdict, the plaintiff would be entitled to arrest the judgment upon this ground. If the case had been reversed, there would have been ample ground for moving for a new trial, on account of the deficiency of the evidence.

Taliter proces-
sum est.

Archbold contra. In *Middleton v. Price*, the question arose upon mesue process. [*Denman*, C. J. The Court do not think it necessary that you should notice those cases. The question is, whether there was evidence of fraud to warrant the finding of the jury]. The defendants were not bound to prove the points which were left to the jury. It was not incumbent on the defendant to prove every step of the cause. It is not necessary to set forth the whole proceedings in the plea, *Pitt v. Knight* (d). [*Denman*, C. J. The rules as to pleading only are there laid down: nothing is said as to the proof]. The proof is regulated by the pleadings. The pleadings set out the judgment only, and it is incumbent on the party impugning the judgment, to shew that the proceedings were not regular. [*Taunton*, J. In the ancient pleadings, the proceedings were all set out, and though the modern pleadings are shorter, the proof required is not narrowed.] The ancient pleadings which set out

(a) 2 Lutw. 918.

(b) 3 Levinz, 141.

(c) 1 Wils. 17; 2 Stra. 118.

(d) 1 Wms. Saund. 92, note 2.

judgments in courts of record, stated the proceedings in the same manner as they did when they set out judgments in the inferior courts; and it must be supposed, that now when the proof is much narrowed in the one case, it must be so in the other. They are put upon the same footing in pleading, and therefore it is to be presumed, *primâ facie* at least, that they are subject to the same requirements as to proof. [*Denman*, C. J. The proof required in stating judgments of courts of record, need not be the same as in the case of judgments of courts not of record, the record itself having evidence of every thing contained in it.] All that it was necessary to prove was the justices, the plaint, and the judgment. [*Patteson*, J. There is one point of your case which has not been adverted to. It seems that the appearance was not in person, but by another who was not an attorney. Upon looking into the old entries in books as to county courts, I find that the appearances were always in *propriâ personâ*. The appearance in this case seems to be contrary to common law; and in order to warrant it some special custom should be shewn. It was said, that the custom here was to appear either by bailiff or by attorney. Here it does not appear from the minute in the plaint book, that *Ellis*, who appeared, was either bailiff or attorney.] He acted as deputy, and that is a sufficient acting by attorney. Before the statute of 3 *Jac.* 1, c. 7, (s. 2,) there was, it is believed, no such thing as a regularly admitted attorney(a); and therefore in the interval which had occurred between the statute of Westminster 2, (13 *Edw.* 1, cap. 10,) which first authorized a party to appear by attorney, and the passing of the statute of *James*, an attorney must have been a mere deputy. In county courts the appearance must be according to the common law; it is otherwise in courts of record, where regularly admitted attorneys are required by statute. [*Patteson* J. I do not mean a regularly admitted attorney, but simply an authorized agent.] It sufficiently appears from the proof, that he was an agent. The

1833.

 THOMPSON
 v.
 BLACKHURST.

Appearance in
 county court
 by attorney.

(a) Vide tamen 4 *Hen.* 4, c. 18; 33 *Hen.* 6, c. 7; 18 *Eliz.* c. 14, s. 3.

1833.

 THOMPSON
 v.
 BLACKBURN.

length of time which has elapsed between the issuing of the justicies and the entering of the plaint, is no hardship upon a defendant, as it is in his power to force on the proceedings to a conclusion if he thinks proper. Until the late rule of Court, if the party had sued out a writ in the Court of Common Pleas, he was never considered to be out of Court. The Court at Preston follows the Court of Common Pleas at Lancaster, which latter court follows the Common Pleas at Westminster. [*Patteson, J.* It does not follow it in all particulars. They cannot there declare before the defendant has appeared.]

DENMAN, C. J.—I cannot bring myself to entertain any doubt upon this subject. The defendant could sustain his justification only by proving all the proceedings in the county court. It was necessary to shew the appearance. In order to prove the appearance, it was said that one *Ellis* appeared, which *Ellis* was bailiff, and perpetually appeared for others upon payment of 2s. 4d. The validity of this practice we are not now to discuss, for the jury have found that the warrant was not served or the 2s. 4d. paid. The only question is, whether the jury are justified in coming to the conclusion at which they have arrived. It was said that a motion had been made in the county court, to set aside the proceedings for irregularity, which had been dismissed. It does not at all follow that the jury were wrong in finding a verdict for the plaintiff. Looking at all the circumstances of suspicion in this case, the jury have very naturally found that the whole was a collusive proceeding. I think the rule therefore ought to be discharged.

LITLEDALE, J.—I am also of opinion that the rule should be discharged. The appearance, as entered upon the minutes, was not by the party himself; and this afforded sufficient ground for making inquiry as to whether *Ellis* had any authority to appear. It was found that he had not.

TAUNTON, J.—I am of the same opinion. Two matters are found; the first, that the process was not served, and the second, that the 2s. 4d. (which would warrant *Ellis* in appearing) was not paid. These facts, as found, raise a violent presumption of fraud; and I see no reason to find fault with the finding of the jury. *Ellis* might have been called to prove payment, if he had been paid; but this was not done. The practice as to appearance may be good; but there is not sufficient matter found to supply proof that that practice has been pursued. It is said that the judgment is conclusive. A distinction has always been made in this respect between Courts of record and Courts not of record. In *Walker v. Witter* (a), which was an action of debt brought on a judgment of a Court in Jamaica, Lord *Mansfield* thus expresses himself:—"The difficulty in the case had arisen from not fixing accurately what a Court of record is in the eye of the law. That description is confined properly to certain Courts in England; and *their judgments cannot be controverted*. Foreign Courts, and Courts in England not of record, have not that privilege, nor the Courts in Wales, &c. The doctrine in the case of *Sinclair v. Fraser* was unquestionable. Foreign judgments are a ground of action everywhere, but they are examinable." Lord *Kenyon*, (who differed materially from Lord *Mansfield* upon these points,) in giving judgment in the case of *Galbraith v. Neville* (b), refers to the *Duchess of Kingston's* case (c); and says, that it was there held that the judgment of the ecclesiastical court might be examined on the ground of fraud. If the judgment of the ecclesiastical court may be impeached on the ground of fraud, surely the judgment of the county court may be. Here, I think that the finding of the jury was equivalent to a finding that the judgment

1833.

 THOMPSON
 v.
 BLACKHURST.

(a) 1 Dougl. 1. And see *Plummer v. Woodburne*, 7 Dowl. and Ryl. 25; 4 Barn. and Cress. 625; *Phillips v. Allen*, 2 Mann. and Ryl. 580, 589, n. (b)

(b) Cited in a note to *Walker v. Witter*, 1 Dougl. 6.

(c) Since reported in 11 Hargrave's State Trials, 198, and in 20 Howell's State Trials, 355.

1833.

THOMPSON
v.

BLACKHURST.

had been obtained by fraud. It was a judgment obtained behind the back of the party.

PATTESON, J.—I think the rule ought to be discharged. It seems to have been admitted by Mr. *Archbold*, that the judgment was not conclusive (a). He does not say that the judgment is conclusive, but that because there was a motion made to set aside the judgment for irregularity, which was dismissed, its validity ought to be presumed, and no question upon it ought to have been submitted to the jury. But, on the other hand, it did not appear upon what ground that motion had been made. My opinion is, that this was a case for the jury to determine. The practice that was proved may or may not be lawful; but it would take a great deal to persuade me that it can be so. According to the practice as stated, a justices might issue; at any time after that, fifty years perhaps, 2s. 4d. might be required from the defendant, to authorize the bailiff to appear for him; fifty years afterwards an appearance might be entered; and a judgment might thus be obtained without the defendant's knowing any thing whatever about it. I cannot believe that such a custom would be lawful. But here the jury has found that the matter required by the practice has not been performed; therefore, even supposing the practice good, it does not come into operation in this case. I do not think we are called upon to disturb the finding of the jury.

Rule discharged.

(a) Vide *Phillips v. Allen*, 2 Mann. & Ry. 580 (a), 581 (a), 586, 588, 589 (a).

1833.



KIRK v. STRICKWOOD.

ASSUMPSIT on a promissory note for 19*l.* 18*s.* 6*d.*
Plea: the general issue. At the trial of this cause before
Denman, C. J., at the London sittings after Michaelmas
 Term, 1832, the following facts appeared :

The defendant was the alleged father of an illegitimate daughter, who, when about twenty-one years old, became insane. The defendant applied to the overseers of the poor of the parish of Whitechapel, to have her conveyed to a lunatic asylum; and a proper order was made for her reception into the parish asylum at Bethnal Green, where she continued for some months. The overseers first made a demand upon the defendant of 15*l.* for the maintenance of his daughter, the lunatic; of which he took no notice. On the 30th of August, 1830, the defendant was summoned to appear before two magistrates for the county of Middlesex, to shew cause why an order should not be made upon him for the maintenance of his daughter. At the petty sessions, held two days subsequently at the Lambeth Police Office, an order was made upon the defendant to pay to the overseers of the poor of Whitechapel the sum of 15*l.* 8*s.* for the past maintenance of his daughter, and the sum of 11*s.* per week from the date of the order, so long as she should remain chargeable to the parish. At the next Clerkenwell sessions the defendant was indicted for disobedience to this order, and on the 26th of October, 1830, he was found guilty upon this indictment. Sentence, however, was not at that time passed upon him, but he was committed to prison, the Court recommending that he should settle with the overseers. The overseers then intimated to him that if 40*l.* were paid, the matter might be compromised; and it was finally arranged between them that the defendant should pay 20*l.* in cash, and give a promissory note for 19*l.* 18*s.* 6*d.*; by which sums the costs of the prosecution were intended to

A promissory note, given by a defendant in prison after conviction for a misdemeanor and before sentence, in pursuance of a recommendation of the Court to compromise, is valid; although the Court is not apprized of the terms of the compromise, and although the costs of the prosecution are included in the note.

1833.

KIRK
v.

STRICKWOOD.

be covered. On the 28th of October a nominal sentence was passed on the defendant, and he was fined a shilling and discharged; but it did not appear that the Court ever knew what were the precise terms of the arrangement entered into between the parties. The arrangement was afterwards carried into effect by payment of the 20*l.* and by giving the note upon which this action was brought. It was objected, on the part of the defendants, that the note given under the above circumstances was illegal. The jury found a verdict for the plaintiff, and the learned Chief Justice gave the defendant leave to move to enter a nonsuit.

F. Kelly (with whom was *White*) now moved on behalf of the defendant. The question for the decision of the Court is, whether this case can be distinguished from *Beeley v. Wingfield* (a), to which it is apparently similar. There the defendant was indicted at the sessions for ill-treating his parish apprentice; and being convicted, it was suggested to him by the chairman of the Court, that if he agreed to pay 40 guineas towards the expenses of the prosecution, he should only be imprisoned six months instead of twelve. The defendant accordingly gave a promissory note for 42*l.*, and in the action which was brought for the nonpayment of that note, it was held good. There the Court had particularly pointed out the specific mode in which the matter should be settled. Lord *Ellenborough* said that the security in question, given with the sanction of the Court, is rather to be considered as part of the punishment suffered by the defendant in expiation of his offence. The Court is the only proper judge of the penalty to be inflicted. Here the party was committed to prison, with a *general* recommendation to settle, and the parish officers had thus an opportunity of imposing what terms they pleased. If they had only received the exact sum which the defendant was liable to pay in pursuance of

(a) 11 East, 46.

the order, the case might be within the principle, though not within the terms, of Lord *Ellenborough's* decision. It was incumbent on the parish officers to shew that they did not take an improper advantage of the situation of the defendant.

1833.
KIRK
v.
STRICKWOOD.

By the COURT.—The present case falls within the principle of *Beeley v. Wingfield*. The party was tried and remanded, and while in prison the present arrangement was made in pursuance of the recommendation of the Court. On the day following that on which the arrangement was entered into, a nominal sentence was passed upon him, and he might have then stated to the Court the terms imposed upon him, and have complained of the hardship of them, if he thought himself aggrieved. The note is, *prima facie*, a good note, and it lay upon the defendant to shew that the consideration was bad.

Rule refused. (a)

(a) Vide *Edgecombe v. Rodd*, 5 East, 294; 1 Smith, 515.

The KING v. MINSHULL.

ONE *Williams* obtained a licence for selling exciseable liquors, under the following circumstances:—An application for a licence was made by him to the special sessions, and upon its coming on to be considered, three, out of six magistrates who were present, expressed themselves willing to grant the licence, and the other three opposed it. Amongst the latter was a gentleman of the name of *Becket*; but upon the licence there appeared the signature of the three consenting magistrates and also of Mr. *Becket*, so that the licence was signed by the requisite majority of the justices present. *Williams*, upon receiving the licence so signed, obtained the regular licence from the excise office. One *Edwards*, a neighbouring publican, informed against *Williams* for selling beer and spirituous liquors without a

A magistrate cannot be required to hear evidence which ought not to affect his determination.

Semble, a licence to sell beer, although obtained by fraud, is valid, unless the fraud be practised by the party to whom the licence is granted.

1833.

 The KING
 v.
 MINSHULL.

licence. Upon the charge coming to be heard before Mr. *Minshull*, the licence signed by the four magistrates was produced; and the charge was dismissed by the magistrate, who refused to receive any evidence as to the mode in which the signature of Mr. *Becket* had been obtained. It does not appear to have been suggested that the signature of Mr. *Becket* had been obtained by fraud.

F. Pollock obtained a rule calling upon Mr. *Minshull* to shew cause why a mandamus should not issue commanding him to receive the evidence: against which

Sir *J. Scarlett* now shewed cause. The magistrate acted rightly in dismissing the charge. The licence was produced to him duly signed, and it was shewn to have been acted upon by the excise officer. Under these circumstances he thought he was not warranted in treating *Williams* as having acted illegally. Although it may not have been the intention of Mr. *Becket* to sign the licence, yet the signature is conclusive, unless it can be clearly shewn to have been obtained by the fraud of the party who uses it.

F. Pollock, contra. The signature was obtained through fraud. At the time when Mr. *Becket* refused to concur in granting the licence, and stated the reasons for his opposition, *Williams* was present. The licence afterwards appears to have been signed by this very gentleman, who would not have subscribed his name unless he had been fraudulently led to suppose that the document laid before him was some other than the licence in question.

By the COURT.—It appears to us that the magistrate has acted correctly throughout. The licence appearing to be signed by four magistrates out of six, it must be held good, unless fraud be proved. Mr. *Becket* may have altered his determination. But whether that be so or not, there is no evidence to charge *Williams* personally with

having fraudulently and surreptitiously obtained the licence; and therefore he cannot be fined for having acted *bonâ fide* under it.

Rule discharged.

1833.
The KING
v.
MINSHULL.

MARSHALL, Assignee of REES DAVIES, a Bankrupt, v.
BARKWORTH.

TROVER. At the trial of this cause before *Alderson, J.* at the York spring assizes 1832, the following facts appeared:—*Davies*, the bankrupt, a bookseller, residing at Hull, having become indebted to Messrs. *Raikes*, the bankers there, in a considerable sum of money, gave them a warrant of attorney for 2000*l.* as a security. On the 2d of June 1832, judgment was entered up, and a *fi. fa.* issued to the defendant as sheriff of Hull, to levy 1036*l.* 17*s.* 1½*d.*, and on the 3d of June the sheriff's officer seized the stock in *Davies's* shop. On the 4th of June a docket was struck against *Davies*, of which notice was served upon the defendant on the 6th of June. On the 9th of June a fiat in bankruptcy issued, to support which evidence was given, that on the 6th June *Davies* had executed a deed of assignment of the whole of his effects for the benefit of all his creditors. The defence set up was, that the act of bankruptcy had been concerted. The learned judge told the jury that if the act of bankruptcy had been concerted between the bankrupt and the petitioning creditor, it was not such an act as would support a fiat. The jury found a verdict for the defendant. In Trinity term last *Wightman* obtained a rule nisi for a new trial, against which

Though a concerted commission or fiat in bankruptcy is protected by 1 & 2 Will. 4, c. 56, s. 42, a concerted act of bankruptcy is still a nullity.

F. Pollock, Archbold, and Cresswell, now shewed cause. The question is, whether the mere placing a seal to an instrument which purports to be an assignment of all the effects of a trader, and doing this in concert with the peti-

1833.

MARSHALL
v.
BARKWORTH.

tioning creditor, is an act of bankruptcy. The concert is a fraud upon the creditor, and a fraud upon the policy of the bankrupt law, and makes the assignment of no effect. The Bankrupt Act (a) provides, that if any person shall make or cause to be made any fraudulent grant or conveyance of any of his lands, tenements, goods or chattels, or any fraudulent gift, delivery or transfer, with intent to defeat or delay his creditors, he shall be deemed thereby to have committed an act of bankruptcy. The latter part of the clause cannot be treated as an immaterial part. By the assignment in this case, it was not intended to defeat or delay the creditors. The only object the parties had in view, was to make use of this assignment as a fraudulent conveyance, merely for the concerted purpose of procuring a fiat to be granted. This is no more an act of bankruptcy than a preconcerted denial, though the latter has been held to be so where the creditors are actually delayed in consequence of it. The circumstance of the act of bankruptcy having been concerted, is ground for superseding or recalling the fiat, and there can be no reason why the fiat should not be declared void, if it be supersedable in the Court of Review. An act of bankruptcy which is concerted, is in law no act of bankruptcy. In *Shaw v. Williams* (b), *Abbott*, C. J. took a distinction between a concerted commission and a concerted act of bankruptcy, and said that the latter was no act of bankruptcy whatever. There are many cases to shew that where a petitioning creditor has been privy to a deed of composition, he cannot afterwards set up that deed as an act of bankruptcy; *Prosser v. Smith* (c), *Bamford v. Baron* (d), which was cited in *Ex parte Harcourt* (e), *Back v. Gooch* (f), *Tope v. Hockin* (g), *Ex parte Gane* (h), *Tappenden v. Burgess* (i).

(a) 6 Geo. 4, c. 16, s. 3.

(b) Ryan & Mood. 19.

(c) Holt, N. P. C. 442.

(d) 2 T. R. 594, n.

(e) 2 Rose, 213.

(f) 4 Campb. N. P. C. 233,
and Holt, N. P. C. 13.

(g) 7 Barn. & Cress. 101.

(h) 1 Mont. & Mac. 399.

(i) 4 East, 230.

In *Bamford v. Baron* the Court were clearly of opinion that the parties who were privies, and had assented to the deed of assignment, could not set it up as an act of bankruptcy; and said, that Lord *Mansfield* had given it as his opinion, in *Hooper v. Smith*, 1 W. Bla. 441, that those who were privy to a concerted act of bankruptcy could not take advantage of it. In *Tappenden v. Burgess*, Lord *Ellenborough* says, "If *Tappenden* had signed the deed of trust, he could not, as petitioning creditor, have availed himself of it to set it up as an act of bankruptcy, according to the case referred to of *Bamford v. Baron*."

1833.
MARSHALL
v.
BARKWORTH.

It was thought for a short time after the passing of 1 & 2 Will. 4, c. 56, that, by sect. 42, an act of bankruptcy, though concerted, was to be a good act of bankruptcy. And it was so held by *Leach*, Vice-Chancellor, in the case of *Ex parte Gane* (a); but upon appeal to Lord *Eldon*, C. that decision was reversed (b). By 1 & 2 Will. 4, c. 56, s. 42, it is enacted, "that from and after the passing of this act, no commission of bankrupt shall be superseded nor any fiat annulled, nor any adjudication reversed by reason only that the commission, fiat, or adjudication, has been concerted by and between the petitioning creditor, his solicitor or agent, or any of them, and the bankrupt, his solicitor or agent, or any of them, save and except when any petition to supersede a commission for any such cause shall have been already prosecuted and shall be now pending." This does not extend to protect a concerted act of bankruptcy, which would have been particularly specified if that had been the intention of the legislature.

Wightman, contra. The bankrupt has committed an act of bankruptcy, whether concerted or not; for by the assignment of all his effects he deprived himself of the power of trading. There are two species of fraudulent conveyances; such as are an actual fraud upon the creditors, and such as are only fraudulent within the meaning of the

(a) 2 Glyn, & Jam. 319.

(b) 1 Mont. & Mac. 399.

1833.

 MARSHALL
 v.
 BARKWORTH.

Bankrupt Acts. It must be admitted that if a party be privy to a fraudulent conveyance of the first description, he cannot afterwards set it up as an act of bankruptcy; but if the assignment be of the latter description, it may well be set up. The case which has been cited from Holt's N. P. is distinguishable from this, in which the assignment is expressly stated to be for the benefit of all the creditors. There the conveyance was to trustees for all the creditors whose debts amounted to 50*l.*, and was, therefore, a fraud upon the others. In *Tope v. Hockin* it does not appear what the trusts were; and it may be that they were the same as in the last case. If so, it is not an absolute unqualified assignment for the benefit of all the creditors generally. In the present case the assignment was so far from being fraudulent, that it was the bankrupt's duty to do as he has done. It was made for the purpose of causing a more equal distribution of his effects than would otherwise have taken place; *Pickstock v. Lyster* (a), where it was said by Lord *Ellenborough*, C.J., "Such an assignment as the present is to be referred to an act of duty, rather than of fraud, when no purpose of fraud is proved. The act arises out of a discharge of the moral duties attached to his character of debtor, to make the fund available for the whole body of creditors. All the cases in which it has been held that a deed of assignment could not be set up by a petitioning creditor, who was a party to it, have been cases in which the assignment was a fraud upon the creditors, and contrary to the policy of the Bankrupt Act."

With regard to the operation of 1 & 2 *Will.* 4, c. 56, s. 42, that clause is clearly applicable to by-gone commissions; but it is said that it applies only to concerted commissions, and not to concerted acts of bankruptcy. By a concerted commission must be meant, not the commission only, but also all things necessary to support that commission. The more liberal construction of the clause is, that the legis-

(a) 3 M. & S. 371.

lature intended, that in all cases where the commission was formerly liable to be superseded on the ground of concert, it should no longer continue so. The assignment in this case is entirely consistent with the policy of the Bankrupt Act, for it is admitted to be in itself a good act of bankruptcy, though it is contended that the petitioning creditor, because of his concert, may not set it up. If this be the case, the act should be so liberally construed as to bring the case within its protection. Great inconvenience would arise from a contrary construction. The commission may have been worked, debts paid, and a variety of acts done under it. Are these acts to be considered invalid simply because the petitioning creditor was a party in concerting the act of bankruptcy? The policy of the act was to protect commissions in cases where one of the requisites had been concerted.

1833.
MARSHALL
v.
BARKWORTH.

DENMAN, C. J.—I am of opinion that this rule ought to be discharged. By the cases it is decided, that before the late statute this was an act of bankruptcy, but such a one, that the petitioning creditor, who was privy to it, cannot set it up as an act of bankruptcy. Then comes the question, whether the late act changes this? It appears to me that the statute has studiously avoided mentioning acts of bankruptcy. It speaks of a commission, fiat, and adjudication, but says nothing of acts of bankruptcy. Thus the law on this point is left precisely as it was before. I think it quite clear that when an act is done in concert with a particular creditor, he cannot afterwards set it up as an act of bankruptcy.

LITTLEDAL, J.—There is no difference between the effect of concert with the petitioning creditor since the last Bankrupt Act and before it. This may be a clear act of bankruptcy, upon which other creditors might take out a commission; but a party privy to it cannot be a good petitioning creditor. The new statute rather goes to confirm

1838.

MARSHALL
v.
BARKWORTH.

the old law. The 42d section enacts, "that no commission of bankrupt shall be superseded, nor any fiat annulled, nor any adjudication reversed, by reason only that the commission, fiat or adjudication, has been concerted between the petitioning creditor and the bankrupt." The enumeration of commissions, fiats and adjudications, shews that it was not the intention to include acts of bankruptcy. It appears to me, therefore, that this commission cannot be supported.

TAUNTON, J. concurred.

PATTESON, J.—I am also of opinion that the rule ought to be discharged. Before the late statute a deed of assignment concerted by the parties could not have been set up by one of the parties privy to it as an act of bankruptcy. I admit that the deed is not fraudulent in itself; but it is fraudulent within the meaning of the Bankrupt Acts. *Pickstock v. Lyster*, and *Bamford v. Baron*, shew that the distinction made by Mr. *Wightman* is not good; as they are both instances in which the deed is not fraudulent in itself. The late act of 1 & 2 Will. 4, c. 56, s. 42, provides, that no commission, fiat or adjudication shall be superseded, &c. (a) If the legislature had intended to apply this enactment to the act of bankruptcy, the act of bankruptcy would have been particularly mentioned. I can easily conceive that where there has been a good act of bankruptcy, every thing else may be concerted without any inconvenience. Before the statute, if there had been a trading, a petitioning creditor's debt, and an act of bankruptcy, yet if the commission itself had been concerted it would have been supersedable. It was to protect such a commission that this enactment was made.

Rule discharged.

(a) *Suprà*, 249.

1833.

The KING v. The Mayor and Aldermen of the City of
LONDON.

IN Michaelmas term last Sir *J. Scarlett* obtained a rule nisi for a mandamus directed to the Mayor and Court of Aldermen of London, to admit *Michael Scales* as an Alderman of London. From affidavits which were then produced to the Court, it appeared that a previous application of the same kind had been made on behalf of *Scales*, after an election in the ward of Portsoken, at which *Scales* had been declared to be duly elected. The Mayor and Court of Aldermen refusing to admit and swear him as alderman for the said ward, a mandamus was granted by this Court. To this mandamus a return was made, which was adjudged good and sufficient in law. *Scales* afterwards brought an action against the corporation of London for a false return, which action is still pending. In January, 1832, another election took place, when *Scales* was again elected. The Court of Aldermen refused to admit him, and swore in Mr. *Hughes*, the other candidate. Upon this *Scales* applied to the Court for leave to file an information in the nature of a *quo warranto* against *Hughes*. Leave was granted, the information was filed, and *Hughes* suffered judgment of ouster to be entered against him.

It is no ground for refusing a mandamus to admit a party to an office to which he has been elected, that to a similar mandamus, granted in respect of a former election of the same party, a return was made, shewing an excuse, valid in point of law, for not admitting him.

Campbell, S. G., Law, Common Serjeant, and *Follett*, now shewed cause. The rule nisi was obtained upon the supposition that there had been no adjudication by the Court of Aldermen. It would be nugatory to grant a mandamus now, as the same return would be made to this mandamus as was made to the preceding one. The Court of Aldermen has a discretionary power to admit or reject a person who has been elected alderman. On the former election *Scales* petitioned to be admitted; a petition was presented by other persons against his return; and that Court, after hearing the petitioners, has adjudicated that he is an unfit person to fill the office of alderman. The Court of

1833.
 The KING
 v.
 MAYOR and
 ALDERMEN of
 LONDON.

Aldermen is not obliged to state why they think him an improper person; *Rex v. Mayor of London (a)*. In making the return it will not be necessary to state that the Court heard evidence. In the case of the election of the Lord Mayor of London himself, the Crown has the power of refusing to admit him, if it be thought that he is an improper person, without stating the ground of the rejection.

Sir *J. Scarlett*, *contra*, was stopped by the Court.

DENMAN, C. J.—I think the rule ought to be made absolute, in order that *Scales* may have an opportunity of controverting the facts stated in the return.

TAUNTON, J.—The rule ought to be made absolute. *Scales* ought to have an opportunity of traversing the facts stated in the return. Suppose *Scales* wishes to try the validity of the custom for the Court of Aldermen to decide upon the fitness of a person elected, he will have no opportunity of doing so unless a return be made to this mandamus.

LITLEDALE, J., and PATTESON, J. concurred.

Rule absolute (*b*).

- (a) 3 Barn. & Adol. 255. mandamus, which, in Trinity Term
 (b) A return was made to this 1833, was held sufficient; *vide post*.

The KING v. MATTHIAS ATTWOOD, Esq.

Where a charter of incorporation authorizes the corporators to elect a master *de seipsis*, a bye-law narrowing the body of electors is valid.

The existence of such a bye-law may, without the intervention of a jury, be judicially inferred, from an ancient usage for the election to be so conducted.

Though the bye-law would be void if it also lessened the number of persons eligible to the office, such a vice in the presumed bye-law will not be inferred from the circumstance of the election by the limited body having almost uniformly fallen upon members of the limited body.

Nor will the Court, on that ground, give leave to file an information in the nature of a quo warranto, for the purpose of investigating the title of a master elected agreeably to such usage.

tion in the nature of a *quo warranto* should not be exhibited against him, requiring him to shew by what authority he claims to be "master of the company of merchant-tailors of the fraternity of St. John the Baptist, in the city of London," on the grounds that he was not legally elected to the said office agreeably to the existing charters granted to and accepted by the said company, or according to any legal bye-law or bye-laws of the said company, or according to any legal uniform usage, or according to law.

From the affidavits it appeared, that the governing charter of the society was one granted in 18th *Henry* 7, in which the following charters were set out by *inspeximus*: 1 *Edw.* 3, 15 *Edw.* 3, 14 *Rich.* 2, 9 *Hen.* 4, 18 *Hen.* 6, 5 *Edw.* 4.

By the charter of 1 *Edw.* 3, "the king does accept and ratify the guild of tailors and linen-armourers of the city of London, willing and granting that the men of the misteries aforesaid, and their successors, shall have and hold their guild once a year, as it hath been anciently accustomed to be done, and in the same to settle and govern their misteries, and the defaults of their servants, by view of the mayor of the city aforesaid for the time being, or of any one whom he shall for that purpose appoint in his place, and to correct and amend the same, by the most honest and efficient men of the said misteries, as may appear most advantageous for the commonalty of Our people. And that no one shall hold a counter or shop of the said misteries, within the liberty of the city, unless he be of the freedom of the city; nor shall any one be admitted to the said freedom, unless it shall be testified by honest and lawful men of the said misteries, that he is honest, lawful, and fit for the same."

The charter of 14 *Rich.* 2 confirms the preceding charter, and further grants to the aforesaid tailors and linen-armourers, that they and their successors shall, in honour of St. John the Baptist, be able to have, hold, and exercise the said guild and fraternity of tailors and linen-armourers, and of any persons whom they may be willing to receive into the

1833.

The KING
v.
ATTWOOD.

1833.

 The KING
 v.
 ATTWOOD.

said fraternity, and shall be able to elect, have, and make, one master and four wardens (custodes), from among themselves (de seipsis) so often as they shall please, (quociens eis placuerit), or it shall be needful for the governance and keeping and rule of the fraternity aforesaid, for ever, in manner as they shall think best (prout melius sibi placuerit). And the said master and wardens may cause meetings and assemblies, in places of the said city belonging to them, and hold in honest manner their feast of meat and drink on the feast day of St. John the Baptist, and there to make ordinances amongst themselves, as shall seem to them (et ibidem facere ordinaciones inter ipsos, prout sibi viderint), most necessary and fit for the better government of the fraternity aforesaid, for ever, as they have heretofore for a long time been accustomed to do.

The charter of 9 *Hen.* 4 confirms the two preceding charters, and incorporates the fraternity by the name of the fraternity of tailors and linen-armourers of St. John the Baptist in the city of London, and grants that the master and wardens shall be named "the master and wardens of the fraternity of tailors and linen-armourers of St. John the Baptist in the city of London;" and grants to the master and wardens, that they shall have and hold, to them and their successors aforesaid, all lands, tenements, annuities, and other possessions whatsoever heretofore acquired by them or their predecessors, or by any other persons whatsoever, by the name of &c. or by any other &c.: To the use of the tailors and linen-armourers, or fraternity, without hindrance, &c.

The charter of 18 *Hen.* 6, made "by the advice and assent of the lords spiritual and temporal, in a parliament(a) holden, &c." confirmed to the then master and wardens by name, and their successors, their privileges and liberties, as they had been accustomed to enjoy the same.

By charter of 5 *Edw.* 4 the former charters are ratified.

By the charter of 18 *Hen.* 7, (the governing charter) the King, by the advice and consent (b) of the lords spiritual

(a) *Vide post*, 302 (a).

(b) *Ibid.*

and temporal in a parliament holden, &c. confirms the said liberties and franchises to the master and wardens of the fraternity of tailors and linen-armourers of St. John the Baptist in the city of London, and their successors, as the said master and wardens ought and are accustomed to use the same, and as they and their predecessors have always hitherto been accustomed reasonably to use and enjoy the said liberty and franchises, from the time of the making of the said letters, &c. (a) This charter transferred and changed the said guild and fraternity into the name of the guild of merchant-tailors of the fraternity of St. John the Baptist in the city of London; and the master and wardens (magistrum et custodes) of &c. into the name of the master and wardens (magistri et guardianorum) of merchant-tailors of the fraternity of St. John the Baptist in the city of London. And did from thenceforth incorporate the said guild by the name of the guild of merchant-tailors of the fraternity, &c. of St. John the Baptist in the city of London, and the said master and wardens of the guild and fraternity aforesaid, and their successors, by the name of the master and wardens of merchant-tailors of the fraternity, &c. And by the said charter it was granted to the master and wardens of the fraternity aforesaid, and their successors, that they should be able to augment and increase the said fraternity, and to hold the said fraternity of whatsoever persons, natives, whom they might be willing to receive into the same fraternity; and to retain, have, and enjoy all and singular persons of the said fraternity, or received into the same fraternity, or from thenceforth to be received into the same, lawfully and freely, without the hindrance and disturbance of any person or persons of any other art or mystery of the city aforesaid. And that the

1833.

The KING
v.
ATTWOOD

(a) Et ut iidem magister et custodes eis uti debent et solent, ipsique et prædecessores sui libertatibus et franchesiis illis, a tem-

pore confeccionis literarum prædictarum semper hactenus, rationabiliter uti et gaudere consueverunt.

1833.
The King
v.
ATTWOOD.

master and wardens of the said fraternity, and their successors, shall have, hold, possess, and enjoy, to them and their successors, all lands and tenements, rents, reversions and services, and other hereditaments and possessions, whatsoever and wheresoever, goods and chattels, and all liberties, franchises, privileges and grants which the master and wardens of the said guild or fraternity had at the time of the making of that charter, as they and their predecessors, or men of the aforesaid misteries (*aut ipsi vel predecessores sui, sive homines prædictarum misterarum,*) had theretofore had, possessed, or held, or had been to them, or any of them, or to the said guild or fraternity theretofore given and granted. And that the master and wardens, by their aforesaid name, should be able to purchase, receive, alienate, grant, and lease lands, &c. and to plead and be impleaded in all suits. And that they should be able to make, ordain and execute statutes and ordinances respecting their mistery, according to the necessity and exigence of the case: and gives them full and entire survey, search, governance and correction of the men of the said mistery, within the said city and the liberties and suburbs thereof, &c. &c. &c. The affidavits on the part of the relator stated that the whole government, control, elections of master and officers, and management of the company, were exercised by the master and wardens, and a body called the court of assistants, who were not elected by the fraternity, and who had usurped and exercised the said offices contrary to the charters of the said company. That the body called the court of assistants consisted of thirty-nine members, including the master and wardens. That the master and wardens were elected by the court of assistants from amongst themselves; that the members composing the court of assistants were selected and elected by themselves, without reference to the rest of the fraternity; that their number was uncertain and varying. That the defendant was elected out of the said court of assistants, being a member of that court

at the time of his election. That the master and wardens had refused to allow the freemen and liverymen to participate in the election of a master.

On the part of the defendant an affidavit was filed by the clerk and solicitor to the company, who stated that he had examined the records now extant of the elections of the masters of the company, from 1488 to 1493, from 1562 to 1663, and from 1672 down to the present time, and that upon no occasion during those periods did it appear that the fraternity at large, or any members thereof, being merely freemen or liverymen, had been summoned to or had taken any part in the election of a master of the company; but, on the contrary, the master, wardens, and members of the court of assistants for the time being were the only members of the fraternity who appeared by the records, during the whole of those periods, to have attended at and taken part in the said several elections of master. That the court of assistants is a body elected from the freemen and liverymen of the fraternity, and that the members of the said court continued to be freemen and liverymen after their election; and which court of assistants appears, from the earliest records found among the muniments of the company, to have existed from the earliest times. That all the masters elected *during* the whole of the period aforesaid, have invariably been freemen of the company, and members of the fraternity at large, at the time of their election as masters; and it was denied that they had invariably been members of the court of assistants at the time of their election, for it appeared by the records that *freemen* of the company had been *elected* to the office of master, who were *not* at the time of their election *members of the court of assistants*, and who do not appear to have been, previously to their election, members of the court of assistants. That defendant was duly elected to the office of master, and at the time of his election was and still is freeman of the fraternity. That the court of assistants consists at the pre-

1893.

 The King
 v.
 Attwood.

1833.
The KING
v.
ATTWOOD.

sent time of thirty-three, but generally of thirty-five, respectable and responsible men, chosen from among the liverymen and freemen of the fraternity, and continuing to be liverymen and freemen at the time of their election.

On the day appointed for showing cause against the rule, it was urged that the grounds of objection to the election of the defendant, as master of the company, were not stated in a manner sufficiently explicit. Subsequently another rule was drawn up, thus stating the grounds of objection.

1. That the defendant was not legally elected to the said office, agreeably to the existing charter of King *Henry* the Seventh, and those therein recited, which direct that the whole fraternity shall elect a master from amongst themselves.

2. That he was not elected by the fraternity from amongst themselves, but by a portion or committee of the whole from *themselves*, who are self-elected, and fluctuating and uncertain in their number.

3. That this mode of electing a master is repugnant to and inconsistent with the directions of the said charter, and narrows the election by an unreasonable restriction.

4. That the class of persons eligible to the office of master is thereby narrowed.

5. That the defendant was elected master according to a usage observed by the company in the elections of master, that a portion of the whole fraternity, called the court of assistants, should elect the master from themselves, which is inconsistent with the directions of the charters.

6. That no bye-law authorizes the mode of election by which the defendant was nominated master.

7. That no legal usage authorizes it.

8. That the nomination of the defendant to be master is inconsistent with the spirit and direction of the charters, which intended the appointment to that office to vest in all the members of the company, from out of themselves.

9. That the nomination of the defendant to be master is

illegal and void, as made by a portion or committee of the whole fraternity, indefinite, and regulated by no bye-law or uniform usage.

10. That the defendant was not elected according to the directions of the charters, having been elected by a select body out of a select body—that there is no bye-law which directs and sanctions such a mode of election; and if there were such a bye-law in point of fact, it would be void in point of law.

Against this rule,

Campbell, S. G., Sir *J. Scarlett*, *Coleridge*, Serjt., and *Follett*, now shewed cause. This is an office, for the usurpation of which a *quo warranto* will not lie. It is not within 9 *Anne*, c. 20. The preamble of that statute recites, that divers persons had taken upon themselves to execute the offices of mayors, bailiffs, portreeves, and other officers within cities, towns corporate, boroughs and places within England and Wales. The office of master of the Merchant-Tailors' Company is not one of the description of offices contemplated by this statute. The Merchant-Tailors' Company is a mere eleemosynary society, and is no more a subject of a *quo warranto* than the College of Physicians or an insurance company. The master of the company usurps no right of the crown, he has no power to make bye-laws, nor is he connected with the administration of justice or the transaction of public affairs. It is true that the being a freeman of this company gives a man the right of voting for the City of London; but would a *quo warranto* lie against a liveryman, to know why he pretended to vote at an election for the city? By a late act of parliament (a), the occupiers of chambers, being members of the Inns of Court, have a right to vote for members for the city; surely it does not follow that therefore a *quo warranto* may issue to inquire by what right a man claims to exercise the office of treasurer of the Inn. In *The King v. Wal-*

1833.

The King
v.
Attwood.

(a) 2 & 3 *Will.* 4, c. 64, sched. O, 2^d.

1833.
 The KING
 v.
 ATTWOOD.

lis (a), the Court held that the word "place," in the statute of *Anne*, applied to such places as were *ejusdem generis* with those enumerated, viz. cities, towns corporate, and boroughs. In the case of *Horn v. The Cutlers' Company* (b), it was held that the statute of *Anne* did not apply to a private company, as this clearly is. [Taunton, J. There is the case of *The King v. Highmore* (c).] That case was overruled in *The King v. M'Kay* (d). This is a private corporation, and if the trusts are not carried into effect, the Attorney General may file an information, or an application may be made to the Court of Chancery. It is matter of great doubt whether a private individual may file an information in the nature of a *quo warranto* at common law. Assuming that a *quo warranto* will lie, it ought not to issue upon the facts stated in the affidavits, as the defendant is legally elected master. In this company there are 1100 freemen, and about 400 liverymen. It is contended that the right of electing a master is vested in all the freemen; and this argument is founded upon the charter of *Richard 2*. That charter directs the fraternity to elect one master and four wardens from among themselves. The present mode of election has been exercised by the master, warden, and court of assistants, ever since the year 1488; and, for any thing that appears, the same mode of election existed previously to the charter of *Richard 2*, which was granted in 1391. In *The King v. Chester* (e), usage for 100 years only was shown; and Lord *Ellenborough* there said, "Besides the *Scarborough* case, where the usage prevailed, there was another case, I believe, in the time of Lord *Kenyon*, where an usage had prevailed, I may say, almost against the words of the charter; but the Court would not interfere against a long continued usage, upon the words of a charter, which were in any degree doubtful.

(a) 5 T. R. 375. *Et vide Hull Dock Company v. Priestly*, ante, 85, 96.

(b) Selw. Nisi Prius, 7th ed. 1143.

(c) 5 Barn. & Alders. 771.

(d) 8 Dowl. & Ryl. 393; 5 Barn. & Cressw. 640.

(e) 1 M. & S. 101.

Here, the usage has been uniform for upwards of a century, and is not inconsistent with the words of the charter. I am not, therefore, for disturbing it at this day, by granting the rule, especially where another remedy is open to the parties." The words "de se ipsis" in the charter of *Ric. 2*, are ambiguous; and where words are not clear and explicit, contemporaneous usage may be admitted to explain it; *Cope v. Harless* (a). The usage in this case has been uniform from the time of *Ric. 2*. In no document does it appear that an attempt was ever made to have a popular election. Supposing that the mode of election was at this time bad, the charter of *Hen. 7* confirmed all former usages, and was accepted by the corporation. Therefore if the mode of election anterior to the granting of that charter was bad, it then became legal and valid. Admitting that the right of election by the charter of *Ric. 2*, was given to the free-men at large, yet the right of election may by a bye-law be confined to a select part of a corporate body; *The Case of Corporations* (b), *The King v. Ashwell* (c). There the election was originally in the burgesses at large, and a bye-law confining the right of election to such burgesses as had served the office of chamberlain, was held to be valid. In *The King v. Westwood* (d), there was a clause giving the aldermen and bailiffs a power of making a bye-law. A bye-law was made by *the body at large*, giving to the mayor and common-council the power of electing burgesses. That bye-law was held to be legal; *Rex v. Head* (e), *Rex v. Bird* (f). The custom to elect according to the mode now practised existed in 1488. It may have had a legal origin, and it will therefore be inferred that it had. Usage is evidence of a bye-law having been made. The usage is not disputed; there is therefore no necessity to send this to a jury, as the judge who tried the issue would direct the jury to presume the existence of a bye-law. But it is

1833.

The KING
v.
ATTWOOD.

(a) 3 T. R. 288, note.

(b) 4 Co. Rep. 77 b.

(c) 12 East, 22.

(d) 7 Bingh. 1.

(e) 4 Burr. 2515.

(f) 13 East, 367.

1833.

The KING
v.
ATTWOOD.

said, that by a supposed bye-law the number of persons who are eligible to the office of master is limited to those who are members of the court of assistants. This is not true, as there are various instances of the master having been elected from amongst the freemen. But it is said that the masters who have recently been elected, have always been members of the court of assistants, and that a bye-law to that effect must be presumed from such usage. The Court of Directors of the Bank of England have a power of electing proprietors of bank stock to be members of the court; they have never yet elected a Scotchman, is it therefore to be assumed that there is a bye-law excluding Scotchmen, and that the directors act in pursuance of it? It cannot be inferred that there is any bye-law to restrain the election to the members of the court of assistants. But assuming that there is a bye-law narrowing the number of persons eligible to the office of master, to those who are members of the court of assistants, is that bye-law to controul the former bye-law as to the number of electors, and render it invalid? The question at present is, not who are to be elected, but who are the electors. The present is not a case to send to trial. The case of *The King v. Haythorne* (a), was a case of much greater doubt, and there were in that case some grave questions of law to be discussed, but the usage had existed for a great number of years. Lord Tenterden there said, "If we granted a rule on any trivial grounds, we should be calling into doubt the rule and government of one of the most important corporations in this kingdom. We ought to be very careful before we set on foot a proceeding that may have the effect of disturbing such a corporation. I do not mean to say that the law is to differ in the case of a great corporation from that which it would be in a small corporation. But what I mean is this, that in proportion to the importance of any subject which is presented to our consideration, the human mind is so constituted, or my mind is so constituted, as to require

(a) 8 Dowl. & Ryl. 228; 5 B. & C. 410.

somewhat more of conviction, or rather of proof, before I consent to interfere with long-established usages and customs."

1833.

 The KING
 v.
 ATTWOOD.

F. Pollock and Hoggins, contra. A mandamus was in the first instance applied for in this case, and the applicant was told that he had mistaken his remedy, and that the proper course was to apply for an information in the nature of a *quo warranto*. In the case of *The King v. Wukelin*(a), the Court granted a rule, calling upon the defendant to shew by what authority he claimed to be a member of the Company of Tailors in Lichfield. With respect to the *Patten-Makers' case*, the objection was not there taken. It is said that to grant the information would create a disturbance; and that it would be unjustifiable to disturb the right of property enjoyed for so great a length of time. Where private property has been enjoyed for a length of time it ought not to be disturbed, but the same rule is not applicable to public functions. It is laid down that no length of time can make an illegal bye-law valid. Much injustice has been done by this Court having in cases of corporations inquired into what has been established by ancient usage, instead of inquiring into what was consistent with the rights of the crown and of the public. It is admitted that a bye-law is necessary to transfer the right of election from the whole to a select body. It is obvious from the charter of *Ric. 2*, that the whole corporation were to elect from amongst themselves. But then it is said that there is a custom narrowing the number of electors. The authorities referred to on the other side, shew that this Court has latterly at least encouraged inquiry. In all the cases the informations, instead of being refused, have been granted. In *The King v. The Bishop of Chester*(b), where the rule was refused, the reason assigned for such refusal was, that the party had another remedy. In *The King*

(a) 1 Barn. & Adol. 50.

(b) 1 T. R. 396, 404.

1833.

 The KING
 v.
 ATTWOOD.

v. *Ashwell*(a), Lord *Ellenborough* said, that the long continuance of a bye-law would not legalize it. These cases, and *Rer v. Westwood*(b), are all cases of information, granted or offered. It has been said that this should not be sent down to a jury, inasmuch as a jury is a tribunal whose decisions are not always guided by discretion; but a jury is the tribunal by which facts ought to be ascertained. The custom has been to elect by a particular body out of a select number, and this taken as an entire custom is illegal. That such has been the custom is alleged in the affidavits on the part of the relator, and this is not denied in the affidavits filed on the other side, which state that the master has been invariably a freeman, but deny that they have been members of the court of assistants, because the fact of their being so does not appear. If there had ever been any masters who were not members of the court of assistants, they should have been pointed out, and grounds stated whence the knowledge was obtained that they were not members of the court of assistants. If this had been done, it might have been discussed whether it was sufficiently shewn that the particular masters were not members of the court, and whether these elections are not to be taken as instances of a breach of the bye-law, rather than a proof that no such bye-law or custom existed; and these facts should be submitted to a jury. It is a question for a jury, whether one practice has not been mixed up with another. If the facts be as sworn in the affidavit, that persons unnamed and not distinguished in point of time, are the only instances in contradiction to that which it is clear has been the usual custom, a jury would not allow such instances to be a proof of the custom. No one looking at the charter can say that it has been obeyed; but it is said that the charter may be explained by usage; that cannot be when the charter is clear, plain and explicit. Then it is said, a bye-law must be presumed. If that be so, it is a question for a jury to determine what that

(a) 12 East, 32.

(b) 7 Dowl. & Ryl. 267; 4 B. & C. 781.

bye-law is; if the bye-law arises from the entire custom, it is manifestly illegal; Bull. N. P. 211 (a); *Rex v. Spencer* (b), *Rex v. Wallis* (c), *Rex v. Tucker* (d), *Rex v. Mayor of Cambridge* (e), *Rex v. Ashwell* (f), *Rex v. Bird* (g).

1853.

 The KING
 v.
 ATTWOOD.

DENMAN, C. J.—I for one should be extremely sorry to withdraw from the consideration of a jury any question of fact. Here a sufficient case is not made out to warrant our sending this matter to a jury. A case of reasonable doubt must be made out before that can be done. Two objections involved together were made to the election. 1st. That the number of electors has been limited; and 2d. That the number of those eligible to the office has also been curtailed. The first objection is not valid in law, unless there were ground for saying that the number of electors had been unreasonably restrained; and here there is no pretence that it was unreasonable. As to the second objection, the restriction of the number of those eligible to the office would be clearly bad in point of law; but that difficulty is not raised in this case, not even by the affidavit of Mr. *Franks* himself. It would be most unreasonable to infer the existence of a bye-law restricting the number of those eligible. No reasonable doubt is raised whether any such bye-law has been made; and this is the only ground the Court would rely upon in making this rule absolute.

LITLEDALE, J.—I am also of opinion that this rule should be discharged. By the charter of *Ric. 2*, all former usages and customs are confirmed, although this particular usage and mode of election is not pointed out. If we look back we find that the usage is uniform as to the qualification of the electors. Then the charter of *Hen. 7* confirms

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| (a) Citing <i>Case of Corporations</i> ,
4 Co. Rep. 78; and <i>Rex v. Phil-</i> | (d) 2 Selw. N. P. 7th ed. 1159,
1160. |
| <i>lips</i> , 1 Stra. 394. | (e) Ibid. 1160. |
| (b) 3 Burr. 1827. | (f) 12 East, 22. |
| (c) 5 T. R. 375. | (g) 15 East, 367. |

1833.
The KING
v.
ATTWOOD.

the former charters. The validity of a bye-law limiting the number of electors, was argued in *The King v. Westwood*, and decided in the affirmative by the judges and the House of Lords. But it is said that the usage is bad, inasmuch as it must be taken all together, and that the usage has been for a small number to elect only those who are members of the court of assistants. Certainly the usage does appear almost uniform; but it does not follow that there is any bye-law excluding the election of the freemen at large. A bye-law restricting the number of those who are eligible would be bad. The reason why a bye-law restricting the number of the electors is not bad, is, because it tends to prevent disorder and confusion at elections. This reason does not extend to the bye-law limiting the number of the eligible.

TAUNTON, J.—A distinction has been long recognized in Courts of law between a bye-law restricting the number of electors, and a bye-law limiting the number of the eligible. In disposing of this rule, the Court must be understood as not throwing out the inclination of an opinion, that a bye-law narrowing the number of those eligible to an office is valid. In order to induce the Court to make the rule absolute, it is said that where any reasonable doubt exists as to any part of the case, the question should be sent to a jury to ascertain the facts. Undoubtedly that has been a common practice with the Courts; therefore it has been attempted to create a doubt in the mind of the Court, as to whether a custom did not exist by which the number of the eligible was restricted. An ingenious mode of putting the case has been adopted. It is said that it appears from the affidavits, that it has been the uniform course of proceeding to elect members of the court of assistants; and coupling this practice with the usage narrowing the number of electors, it is said here is a compact body of usage limiting the number of the electors and those eligible; this usage forms the ground for presuming one single bye-law, and this bye-law may be good so far as it narrows the number of the

electors, but it is bad inasmuch as it restricts the number of those eligible. I do not think the usage is to be considered as an entire custom, nor do I think that there was any such bye-law as is spoken of; the existence of such a bye-law is by no means a necessary consequence. So far from the usage being uniform, it appears from the affidavit of Mr. *De Mole* that there have been instances to the contrary, although those instances are not stated very explicitly or with much certainty. This case may, however, be decided without the presumption of any bye-law at all; for if there was any presumption of a bye-law, it must be so involved in uncertainty that the Court would perhaps consider themselves bound to send the case to a jury. Upon looking at the charters, it appears clearly from them that this usage existed before the time of legal memory (a). The first charter is in the time of *Edw. 3*, and the second charter was granted in the fifteenth year of the reign of *Edw. 3*, (1341). This charter was granted less than 150 years from the commencement of the time of legal memory; and the usage has existed from time immemorial. Then comes the charter of *Ric. 2*, (1391). The king there not only confirms the charter of his grandfather *Edw. 3*, but also all those good customs and usages which had been previously in existence, and which were at that time enjoyed by the company. The grant is thus:—
 “Concessimus et licenciam dedimus pro nobis et hæredibus nostris, quantum in nobis est, prædictis scissoribus et linearium armaturarum armurariis, quod ipsi et eorum successores, in honorem Sancti Johannis Baptistæ, habere tenere et exercere possint gildam prædictam et fraternitatem dictorum scissorum et linearium armaturarum armurariorum aliarumque personarum quas ipsi recipere voluerint in fraternitatem prædictam ac eligere, habere et facere possint unum magistrum et quatuor custodes de se ipsis, quociens eis placuerit vel opus fuerit, pro gubernatione custodiâ et regimine fraternitatis prædictæ in perpetuum, prout melius sibi placuerit.” It is to be observed that this charter gives the fraternity only a power to choose a master, but no where

1833.
 The King
 v.
 ATTWOOD.

(a) Which is computed from 11 July, 1189.

1833.

 The KING
 v.
 ATTWOOD.

points out the mode in which he is to be elected. At common law, without more, the body at large would have the power of election; but if there were a custom at the time for the select body to choose, that custom would not be at variance with the express grant of the charter. The next material charter is that of the 18 *Hen.* 7. It is admitted that the usage had existed ever since 1468, therefore it must have been subsisting at the time when this charter was granted. This is an *inspeximus* charter; it contains all the preceding charters, and confirms them all, and the liberties, franchises, privileges and grants, which the company or their predecessors have had, possessed or used, "*necnon omnia et omnimoda libertates, franchises, privilegia, et concessionones,*" &c. The usage, therefore, as to the election, existing at this time, was confirmed by this charter. I do not go so far as to say that this charter has the force of an act of parliament, because it has the assent of the lords spiritual and temporal (*a*); but that assent shews that it was more considered, and is a more solemn instrument than a charter *mero motu*.

Election by
 select body.

PATTESON, J.—I am of the same opinion. The objections on the rule, though ten in number, resolve themselves into two. The first is, that the defendant had been elected by a select body instead of the freemen at large. The answer to this objection is, that the mode of election is in conformity with the usage. It is immaterial whether this mode of election commenced by a bye-law or otherwise. The usage might have a legal commencement, and the Court will therefore presume that its origin was legal. I do not agree with the observation which has been made, that it would have been better if the Courts had looked more to charters than to ancient usage; I do not think the observation either called for or just. It has always been the practice of the Courts to look at the usage, and refer it to a legal

Charter, operating as a statute.

(*a*) That a charter granted in parliament operates as a statute, *vide The Prince's case*, 8 Co. Rep. 15; Co. Litt. 98 a; 1 Tho. Co. Litt. 25; *Farrar's case*, cited Skinner, 78; Appendix to *Rowe v. Brenton*, (Dutchy of Cornwall Copper-mine case,) 3 Mann. & Ryl. 482.

origin if it could have one. The second objection is, that the master has been elected from the court of assistants under some supposed bye-law requiring the election to be from that body. Such a usage would undoubtedly be illegal; and if any reasonable doubt were raised as to whether such a custom existed, the Court would grant an information in the nature of a *quo warranto*, to inquire into the fact. But I do not think any reasonable doubt is raised upon the affidavits. It does not follow that because members of a select body have been chosen, that the electors were bound to chuse from that body. It is not necessary to decide the question, whether, in point of jurisdiction, it is competent to the Court to allow the filing of this information in the nature of a *quo warranto*; for the Court have said, that even if they had jurisdiction they would not permit one to issue.

1833.

 The KING
 v.
 ATTWOOD:
 Election from
 select body.

Rule discharged without costs (a).

(a) See in the Mirror of Parliament, part 186, page 276,—part 187, page 352,—part 188, page 386, the discussion which took place in the House of Commons, with reference to this case, on the 18th, 21st and 22d Feb. 1833.

JOHN PRICE v. EASTON.

ASSUMPSIT. The declaration contained three counts. The first count stated, that on the 18th Sept. 1830, one *William Price* was indebted to the plaintiff in the sum of 1*l*. (being the balance of a larger sum of money before that time due from *W. P.* to the plaintiff) for the price of a certain timber carriage before that time sold and delivered by the plaintiff to *W. P.*; and that *W. P.* being so indebted, the defendant, in consideration thereof, and in consideration that *W. P.*, at the request of the defendant, had agreed, and had undertaken and promised the defendant to work for the defendant at certain wages agreed upon by and between *W. P.* and the defendant, in consideration of *W. P.*'s leaving the amount which might be earned by him *W. P.* in the defend-

A count in assumpsit, stating a promise to pay a sum of money to the plaintiff, without alleging to whom the promise was made, is insufficient.

An arrangement between *A.* and *B.*, who is indebted to *C.*, that *A.* shall take upon himself *B.*'s debt to *C.* is not binding, and gives no arrangement.

cause of action to *C.* against *B.*, unless *C.* be a party to the

1833.
 PRICE
 v.
 EASTON.

ant's hands, undertook and agreed to pay to the plaintiff the sum of 13*l.* being the balance of the said timber carriage, on or before March, 1831. Averment: that although *W. P.* did, according to the said agreement, work and labour for the defendant, and did by such work and labour earn a large sum of money, to wit, 50*l.* and did leave the same in the defendant's hands on or before the said month of March, 1831, of all which premises the defendant had notice, yet the defendant did not at any time before or on the 31st day of March, 1831, or at any time afterwards, pay to the plaintiff the said sum of 13*l.* or any part thereof. The second count stated that *W. P.* was indebted to the plaintiff in the further sum of 13*l.*, being the balance of an account for a timber carriage before then sold and delivered by the plaintiff to *W. P.* and at his request; and that the said *W. P.* being so indebted, the plaintiff, in consideration thereof, and in consideration that *W. P.*, at the request of the defendant, would work for the defendant, and would leave the produce accruing of and from the said last-mentioned work with the defendant, he the defendant undertook and promised the plaintiff to pay the plaintiff the said sum of 13*l.* balance for the said last-mentioned timber carriage, provided the amount was earned by *W. P.*, and left in the defendant's hands. Averment: that although *W. P.* did work for the defendant, and did by such last-mentioned work earn a sum of money, to wit, 50*l.* and did leave the same in the hands of the defendant in the month of March, 1831, to wit, on &c. at &c. of all which premises the defendant had notice, yet the defendant hath not, although afterwards requested by the plaintiff so to do, as yet paid the said sum of 13*l.* or any part thereof. The consideration stated in the third count was, that the plaintiff should forbear, and give time to *W. P.* for the payment of the sum of 13*l.* due from *W. P.* to the plaintiff, till the month of March, 1831. Plea: non assumpsit.

The cause came on to be tried before *Littledale*, J. at the spring assizes for Herefordshire, 1832, when a verdict was found for the plaintiff on the first and second counts, and for the defendant on the third. In Easter term last, *Camp-*

bell obtained a rule nisi in arrest of judgment upon the first and second counts, against which

1833.
PRICE
v.
EASTON.

Justice now shewed cause. After verdict, every thing will be intended necessary to support the record. This rule was obtained upon the ground that there was no consideration passing between the plaintiffs and the defendant, so as to make the undertaking of the defendant good as between them, and the cases relied on were *Bourne v. Mason* and another (*a*), and *Crow v. Rogers* (*b*), which are stated in Selwyn's Nisi Prius (*c*); and the case of *Dutton v. Poole* (*d*) was alluded to as an exception to the rule laid down in the two preceding cases. But in the cases of *Bourne v. Mason*, and *Crow v. Rogers*, it does not appear that there was any privity or identity of interest between the parties.

A promise, for the breach of which an action of assumpsit may be brought, must be founded upon a sufficient consideration. That consideration may consist either in a loss or detriment sustained by the plaintiff, or in an advantage which has accrued to the defendant. Here there has been detriment to the plaintiff and benefit to the defendant. The detriment to the plaintiff was the postponement of the payment of his debt until a certain sum of money had been earned by *William Price*: the benefit to the defendant was this, that he had the benefit of the labour of *William Price*, and was not under the necessity of paying the price of that labour immediately; for no action could have been brought by *William Price* against the defendant for the amount of his wages, until after the thirty-first day of March. This is analogous to the case of *William Price* putting 13*l.* into his hands, to be paid by him on the 31st day of March to the plaintiff.

There are several cases which shew that where there is an identity of interest, and a privity between three parties, as in this case, an action of assumpsit is maintainable. One is *Starkey v. Mylne* (*e*), which is thus stated: "If *A.* give

(*a*) 1 Vent. 6.

(*b*) 1 Stra. 592.

(*c*) Page 53.

(*d*) 2 Lev. 210; 1 Vent. 318, 332.

(*e*) 1 Roll. Abr. p. 32, pl. 13,
translated in 1 Vin. Abr. 336, pl. 13.

1833.
PRICE
2.
EASTON.

goods to *B.* to the value of 80*l.* out of which he should pay to *C.* 20*l.*, if *B.* does not pay the 20*l.* to *C.*, *C.* can have an action on the case against *B.* and declare that he was indebted to him in 20*l.* for goods of the value of 80*l.* given to him by *A.*, out of which he should pay 20*l.*; for when goods of the value of 80*l.* are given to *B.* by agreement between him and *A.* that he shall pay 20*l.* to *C.*, *that becomes a debt to C.*; as if I deliver 20*l.* to *B.* to pay over to *C.*, *C.* can have an action of debt, or account, or action on the case upon promise for this, against *B.*" Another case, *Disbourne v. Denabie*(*a*), is thus stated: "If *A.* and *B.* are bound in an obligation to pay to *C.* 20*l.* when he comes to the age of twenty-one, and afterwards *A.* makes *B.* his executor, and dies; and *B.*, having assets, assigns this to *D.*, and in consideration of this assignment *D.* promises to *C.* to pay him 20*l.* when he is of the age of twenty-one; *C.*, when twenty-one, shall have an action upon the case upon this promise against *D.*, although no consideration comes from *C.*; for if a man deliver money to *J. S.* to pay over to *B.*, in satisfaction of a debt due to him, this raises a debt to *B.*, and it cannot be revoked; and so here." In *Wilson v. Coupland*(*b*), the plaintiffs were the creditors, and the defendants the debtors, to *Taillasson & Co.*, and it was arranged between all the parties that defendants should pay to the plaintiffs the debt they owed to *Taillasson & Co.* It was held that the plaintiff could recover that debt, and that the defendants, by the arrangement, made themselves liable to an action for money had and received, to the use of the plaintiffs. That case is analogous to the present. In *Curtis v. Collingwood*(*c*), also an authority, there was no consideration proceeding *immediately* from the plaintiff to the defendant. This case resembles those in which an action has been permitted to be brought for money had and received; for here, the money must be supposed to have been placed by *William*

(*a*) 1 Roll. Abr. p. 30, 31, pl. 5; (*b*) 5 Barn. & Ald. 928.
1 Vin. Abr. 333, pl. 3. (*c*) 1 Vent. 29.

Price in the hands of the defendant for the use of the plaintiff.

1833.
PRICE
v.
EASTON.

Campbell, S. G., contra, was stopped by the Court.

LITLEDALE, J.—This case resembles that of *Crow v. Rogers*, and must be governed by it. The case of *Wilson v. Coupland* was an action for money had and received.

TAUNTON, J.—I am of the same opinion. The allegations in the first count of the declaration may be quite consistent with the fact that the defendant knew nothing of the arrangement; and we can only look to the record.

PATTESON, J.—I am entirely of the same opinion. We cannot, after a verdict, supply a necessary allegation; we can only intend all that is necessary to support the allegations that we find in the declaration. I think it quite clear that the allegations in this declaration are insufficient. The first count only alleges a promise to pay the plaintiff, not a promise to the plaintiff to pay him, and this cannot be intended. Both counts must be supported, because the verdict was taken on both counts.

Judgment arrested.

VAUX v. VOLLANS, Clerk.

DEBT for penalties incurred by the defendant under the 57 Geo. 3, c. 99, s. 5, for non-residence on his benefice. Plea, nil debet. At the trial of the cause at the York

The notice in writing required by 57 Geo. 3, c. 99, s. 40, to be given to the bishop previously to the commencement of an action for penalties for non-residence, is not properly served by leaving it in the hands of the registrar, or deputy registrar, of the diocese; such notice must be left at the registry office.

The notice need not be served by the attorney who sues it out.

Whether a clergyman is wilfully absent from his benefice during the time he is in custody for debt, under an arrest made whilst he is residing out of his parish, *quære?*

1833.

VAUX

v.

VOLLANS.

spring assizes 1832, before *Alderson*, J. it appeared that the defendant was the rector of the parish of Hemsworth, in the diocese of York. During the greater part of the year 1829 defendant was absent from his benefice, and resided in London, where he was several times arrested for debt. In 1829 the defendant continued in custody upon *mesne* process, at the suit of the present plaintiff and his brother. In the month of February 1830 he was again arrested, and remained within the rules of the King's Bench prison until the month of March 1831, since which time he has resided in his rectory. The notice required by the 40th section of the act had been signed by the *town agent* of the attorney in the cause; a clerk of that attorney was sent to leave the notice at the registry office of the diocese of York, and finding the office closed, he went to the residence of the deputy registrar and left the notice in his hands. The deputy registrar took the notice to the registry with him on the following morning. It was objected that the absence was not *wilful*, at least during the period of imprisonment. The jury gave their verdict for the plaintiff, and assessed the penalty at 860*l.* including the period of arrest, and at 473*l.* 6*s.* 8*d.* excluding that period. The learned judge gave leave to the defendant to move to enter a nonsuit or to reduce the verdict to 473*l.* 6*s.* 8*d.*, in case the Court should be of opinion that the period of the arrest ought not to be included. In Easter term last *Jones*, Serjeant, obtained a rule *nisi* to enter a nonsuit, or reduce the verdict to 473*l.* 6*s.* 8*d.*, against which

F. Pollock and *Tomlinson* now shewed cause. The 40th section of the 57 *Geo.* 3, c. 99, enacts, that "no writ shall be sued out against, nor any copy of any process at the suit of any informer be served upon, any spiritual person for any penalty or forfeiture incurred under any of the provisions of this act, until a notice in writing of such intended writ or process shall have been delivered to him, or left at the usual or last place of his abode, and also to

the bishop of the diocese, by leaving the same at the registry of his diocese, by the attorney or agent for the party who intends to sue or cause the same to be sued out or served, one calendar month, at the least, before the suing out or serving the same; in which notice shall be clearly and explicitly contained the cause of action which such party hath or claimeth to have, and the penalty or penalties for which such person intends to sue; and on the back of which notices respectively shall be indorsed the name of such attorney or agent, together with the place of his abode; and no such notice shall be given before the first day of April within a year next after such penalty shall have been incurred." The 41st section enacts, "that no plaintiff shall recover any verdict against any spiritual person for any penalty or forfeiture under the provisions of this act, unless it is proved upon the trial of such action that such notices were respectively given as aforesaid." This rule was obtained upon three grounds: 1st, that the notice had not been properly given to the bishop of the diocese; 2dly, that the notice ought to have been served by the person whose name was indorsed upon the back of the process (a); 3dly, that defendant could not be considered to have been *wilfully* absent during the period of his imprisonment, and that therefore the damages ought to be reduced.

As to the first point. This ought to be considered a sufficient service of the notice. It may be doubtful whether or not the dwelling of the registrar is not itself the registry; but at all events the notice found its way to the registry office in time, and this is sufficient. The registrar may be treated as the agent of the attorney to take the notice to the office. As to the second point. The words of this act, with respect to the indorsement and service of the notice, are similar to the 24 Geo. 2, c. 44. In cases under that statute the signature of the attorney is sufficient, and

(a) The name of the attorney was indorsed on the process, and the agent of the attorney served the process.

1833.

Vaux
v.
Vollans.

First point,—
Mode and
place of serving
notice.

Second point,
—By whom
served.

1833.

VAUX

v.

VOLLANS.

Third point,—
Wilfulness of
absence.

service by his clerk has always been considered sufficient, and has never been objected to. As to the third ground. The question whether the absence was wilful, was a question as to the motive, and ought to be left to the jury. In this case the defendant was arrested when absent from his benefice. The case of a detention by arrest, differs materially from that caused by an accident happening to the clergyman, whilst absent from his benefice, the latter being merely his misfortune, whereas the former is the consequence of his own deliberate act in incurring debts which rendered him liable to be arrested.

First point.

Blackburne, contra. The notice was not left at the registry in pursuance of the statute. The preamble of the 40th section is, that spiritual persons may through inadvertence, and in many cases from unavoidable circumstances and causes, become subject to penalties and forfeitures, and vexatious prosecution, unless provision is made for the prevention thereof. This preamble shews that the object of the clause was to protect the clergyman, and it is clear that the legislature must have intended that all the forms required by that clause should be pursued most strictly. [*Patteson*, J. The object of requiring this notice was to enable the bishop to issue his monition.] That was the object, and the object was in fact gained, but this does not make the service of the notice sufficient. A verbal notice to the registrar might have effected this object, or a personal service upon the archbishop; but it will not be contended that the requisitions of the act would in either of those cases have been complied with. The second point may be conceded. Upon the third point, the words of the 5th section of the act are, "who shall wilfully absent himself." In *Scammell v. Willett* (a), which was an action of debt on the statute 21 Hen. 8, against an incumbent of a parish for non-residence, it was held a good defence to the action, that from the unhealthiness of the living the incumbent

Second point,
conceded.

Third point.

could not reside there but at the risk of his life. In that case the absence might have been considered wilful, for there was always a power to return; here there was no such power, the absence having been compulsory. Reliance seems to have been placed by the other side upon the circumstance of the arrest having taken place out of the parish, but it was not intended by the legislature to confine the incumbent within the bounds of his parish, but only to prevent a continued wilful absence.

1833.

 VAUX
 v.
 VOLLANS.

LITLEDALE, J. (*absente*, *Denman*, C. J.)—It appears First point. to me that there has not been a proper service under the act of parliament. The words are, “until a notice in writing of such intended writ or process shall have been delivered to him, or left at the usual or last place of his abode, and also to the bishop of the diocese, by leaving the same at the registry of his diocese.” The notice to the clergyman may be served personally or left at his dwelling-house. The notice to the bishop must be left at the registry. The object must have been, that it should always be left at the place where it is sure to be attended to. It is not sufficient to deliver to the registrar, or deputy registrar, for if that were so, there seems to be no reason for saying that a delivery to the chief clerk or porter would not be sufficient, provided the notice reached the office in good time. It is unnecessary to enter upon the other points.

TAUNTON, J.—I am of the same opinion. We ought First point. to put a strict construction, and, as far as possible, to give effect to all the words of the act. Here the legislature has required that the notice shall be given, not merely to the bishop, but to the bishop by leaving the same at the registry. If we were to construe the statute otherwise, some new case would arise farther from the exact words of the statute, and then another farther still. The safe course, I think, is to adhere to the very words of the statute.

1833.

VAUX
v.

VOLLANS.

First point.

PATTESON, J.—We must comply with the express words of the statute. I confess I had some difficulty in bringing my mind to think the service insufficient; but though I am unable to see the object of the introduction of the words, “by leaving it at the registry,” I know not how we can avoid them. Supposing the party had gone to the palace and delivered the notice into the bishop’s hands, the object would have been gained; but the legislature has required that it shall be gained in a particular way; and we are bound though we do not see the reasons. With regard to the notice having found its way to the office, that was mere accident. The registrar did not put the notice there by way of serving it.

Rule absolute for a nonsuit (*a*).

(*a*) The clerk appears to have delivered the notice into the hands of the registrar as its ultimate destination. If he had requested the registrar to leave the notice at the registry, and the registrar, acceding to the request and accepting the agency, had left the notice accordingly, the service would probably have been held sufficient.

The KING on the Prosecution of LOUIS CHARLES
DAUBUZ v. PENPRAZE and others.

In felony, the Court refused to allow the defendant to enter a suggestion for changing the venue, on the ground of a prejudice pervading the county.

FOLLETT moved for a rule to shew cause why a suggestion for the purpose of changing the venue should not be entered upon the record of an indictment for felony, removed into this court by certiorari. The affidavits stated that the object of the prosecution is to try a question between the lessees of the Duchy of Cornwall and the land-owners; that there is no pretence for calling this a case of felony; and that an impartial trial of the cause cannot be expected in the county. [*Denman*, C. J. Would not your object be gained by drawing the jury from some particular hundred?] The feeling which the case will excite is likely to extend over the whole of the county. There is no exact precedent to ground this application; but there was one case in which

an indictment for a capital felony was removed from Southampton, which is a separate jurisdiction, to Winchester. It must, however, be admitted, that in that case there was no suggestion on the roll.

1833.
The KING
v.
PENFRAZ.

DENMAN, C. J.—I think we cannot suppose that a jury of twelve indifferent men would be so corrupt as to give an unfair verdict in a case of felony.

Rule refused (a).

(a) The defendants were tried at nisi prius at the Launceston Assizes, March, 1833, and acquitted.

BIRD v. BOULTER.

ASSUMPSIT for goods sold and delivered. At the trial before *Littledale*, J. at the Hereford spring assizes, 1832, the following facts appeared. The plaintiff, an auctioneer, was employed by *Smith* to sell wheat in the straw. One lot of wheat was knocked down to the defendant at the sum of 39*l.*, and upon the name of the defendant, as the purchaser, being called out, an entry was made in the sale book by *Pitt*, who attended the auction as the plaintiff's clerk. It was contended for the defendant that the requisites of the 17th section of the Statute of Frauds had not been complied with, and that the defendant was not bound. The jury found a verdict for the plaintiff, and the learned judge gave leave to the defendant to move to enter a nonsuit. In Easter term last a rule nisi to set aside the verdict and enter a nonsuit was obtained by *Ludlow*, Serjt., against which

The highest bidder is bound by the entry in the sale book by the auctioneer's clerk, made in his presence upon his name being called out as the purchaser, even in an action brought by the auctioneer.

Campbell, S. G. (with whom was *Whateley*) now shewed cause. It is not necessary that the plaintiff should rest his case upon doctrines laid down by Lord *Mansfield*, that sales by auction are not within the Statute of Frauds. That is still vexata questio, which the Court will not here be called

1833.

BIRD

v.

BOULTER.

upon to decide. The agreement was signed by *Pitt*, who was the agent of the purchaser; and it was in the defendant's hearing and in his presence that the name was called out and written down. The cases relied on by the other side are those of *Farebrother v. Simmons* (a) and *Wright v. Dannah* (b). It will be contended that those cases decide that one contracting party cannot act as the agent of another, in signing a written contract. The authority of those decisions may be doubted, as the effect of them is to add a condition not contained in the statute. A bond executed by the obligee, as the attorney of the obligor, would, it is conceived, be valid: so a lease, executed by the lessee as the agent of the lessor, would be good. Nor does there appear to be any reason why the drawer of a bill of exchange should not be authorized to accept it, by procuration, for the drawee. It was admitted that if the action had been brought in the name of *Smith*, who was the real vendor and principal of the present plaintiff, the entry made by *Pitt* would have satisfied the statute. If then the defendant would be considered as the purchaser, if the action were brought by *Smith*, he must also be a purchaser now; for it is immaterial, as regards the liability of the defendant, in whose name the action is brought. There is this distinction between the present case and that of *Farebrother v. Simmons*, that here the memorandum of sale was signed with the express privity of the defendant. If the authority had been given by words, there can be no doubt that the defendant would have been bound by the contract. It is true that *Pitt* acted as clerk and servant of the plaintiff, but this cannot disqualify him from being also employed as agent of the purchaser.

Campbell was here stopped by the Court.

Ludlow, Serjt. and *Justice*, in support of the rule.— Unless the Court overrules the case of *Farebrother v. Simmons*, which is in accordance with *Wright v. Dannah*, this

(a) 5 Barn. & Ald. 333.

(b) 2 Campb. 203.

rule must be made absolute. It is admitted that if the action had been brought by *Smith*, the entry by the auctioneer, or by *Pitt* his clerk, would have been a sufficient compliance with the requisites of the 17th section of the Statute of Frauds (a). If *Pitt* is to be considered as the servant of the auctioneer, the entry must be considered as made by the plaintiff himself, which brings this case precisely within the terms of *Farebrother v. Simmons* and *Buckmaster v. Harrop* (b). [*Littledale, J.* This would be to say that the action can never, under the ordinary circumstances, be brought by the auctioneer himself.] He may do so, but he must stand encumbered with all the disadvantages attending his position. It appeared clearly that *Pitt* was attending as regular clerk and servant of the plaintiff, and in no other character. Upon principle, and also upon the authority of *Edden v. Read* (c), the agreement cannot be considered to be good under the Statute of Frauds, and consequently is not binding on the defendant. In that case a receipt signed by the defendant, who was the clerk of the deputy of the receiver-general of taxes, was held to be signed by the defendant, as agent of the receiver-general. In the present case *Boulter* gave no answer when his name was mentioned, and it has been said that at auctions silence ought not to be construed into assent. The clerk is supplied by the auctioneer with the name of the purchaser and the price of the bidding, in such a manner as to shew most clearly that the clerk is acting as servant to the auctioneer. The purchaser may express his assent to the purchase, but that ought not to be construed into an authority to sign a written contract for him. In the case of *Wright v. Dannah*, the defendant was looking over the clerk's paper while he wrote, and suggested a correction, which was made; yet there Lord *Ellenborough* decided that the defendant was not bound, for that the agreement must be signed either by the purchaser himself, or by some third person who was not a

1833.

~
BIRD
v.
BOULTER.

(a) *Coles v. Trecothick*, 9 Vesey,
234; S. C. 1 Smith, 238.

(b) 7 Ves. 341.

(c) 3 Campb. 338.

1833.

 BIRD
 v.
 BOULTER.

contracting party. The case of *Farebrother v. Simmons* was decided upon the principle of *Wright v. Dannah*. Here then is the decision of Lord *Ellenborough*, in the year 1809, adopted and confirmed by Lord *Tenterden* in 1822, and the Court will not say, at the present day, that the decision is not law. [*Patteson*, J. referred to the case of *Blow v. Sutton (a)*.] The contract between the parties is completed when the auctioneer has knocked down any lot to a purchaser, and such purchaser has assented to the bargain. This would be a good contract but for the Statute of Frauds, which requires, in addition, a written contract signed by both parties, or their agents. The clerk merely assists the auctioneer in making this contract. The knocking down by the auctioneer, and entering by the clerk, are uno flatu. He is there under a defined character, with his whole time bought up previously to his entering the room. It cannot then be contended that he is, nevertheless, at liberty to engage himself as agent for others in making a variety of separate contracts. An action for any thing done by the clerk within his authority, would be properly brought against the auctioneer. *Pitt* here acted merely as an automaton, in accordance with the directions of the auctioneer.

DENMAN, C. J.—It appears to me that the case is distinguishable from *Wright v. Dannah* and *Farebrother v. Simmons*; and that the clerk made the entry, not as an automaton, but in a known character. He was present as agent, I think, for both parties.

LITLEDALE, J.—This case is distinguishable from *Farebrother v. Simmons*. I do not see why the clerk should not be the agent of both parties, nor indeed do I see why the auctioneer himself should not sign as agent of the contracting party (b). It is certainly irregular that the contracting

(a) 3 Meriv. 237.

(b) Held that he may, in *M'Comb v. Weeks*, 4 Johns. (American) Cha. Rep. 659, 665. And see

Jackson v. Catlin, 2 Johns. (American Common Law), Rep. 248; and 8 Johns. Rep. 540; *Simonds v. Catlin*, 2 Caines's Rep. 64.

parties should act as each other's agents, but it is very different where the contract is signed by an individual who is not either of the contractors. Were it to be held otherwise, no broker could maintain an action, in his own name, for the breach of a contract signed by him; and at every auction, if the auctioneer or his clerk were not allowed to be the agent of the contracting parties, at every bidding each purchaser would have to come to the table and sign his own name.

1833.

 BIRD
 v.
 BOULTER.

TAUNTON, J.—It is not necessary to overrule the case of *Farebrother v. Simmons*. All that is stated by the chief justice in that case is, that the agent contemplated by the legislature, who is to bind a defendant by his signature, must be a third person, and not the other contracting party upon the record. It is sufficient, in order to distinguish this case from *Farebrother v. Simmons*, to say, that here the agent who signs the contract is a third person, capable of signing as agent of both the contracting parties. I go further than this; *Bird* and *Pitt* may be considered as the constituted agents of the vendor: he appoints the former to announce the biddings, and the latter to take down the names of the purchasers and the prices of the lots. *Pitt* may be considered not only as the agent of the vendors, but also of the purchasers. By their silence when the hammer falls, he has their authority to execute the contract on their behalf.

PATTESON, J.—I am entirely of the same opinion. It is not at all necessary to overrule the case of *Farebrother v. Simmons*. Undoubtedly the words used by Lord *Tenterden* in that case are, that the agent must be a third person, and not the other contracting party. Here there was such a third person. He was sitting there as the agent of all, acknowledged by the silent consent of all. I think this a perfectly clear case.

Rule discharged.

1833.

BURTON v. HAWORTH and KING.

The Court will not set aside an arrest upon the merits, unless it be clear from the affidavits that the plaintiff could not have had any cause of action.

Seemle, that the circumstance of the action being brought for purposes of intimidation, would not be a ground for such interference.

ASSUMPSIT for money paid and laid out and expended by plaintiff, to and for the use of defendants. The defendants were arrested upon an affidavit of debt for 6,700*l*. Special bail was afterwards put in. In Michaelmas term last, *Holt* obtained a rule nisi for the entry of an exoneretur on the bail-piece, upon an affidavit of the following facts.

In January, 1813, the plaintiff being a prisoner for debt in the K. B. applied to the barristers appointed by the 52 *Geo. 3*, c. 165 (*a*), to be discharged. On the 2d February, 1813, the plaintiff was ordered to be discharged, and his estate and effects, both in the province of Lower Canada and elsewhere, were given up by him. It being supposed that these estates vested in the clerk of the peace by virtue of the above act, that officer, on the 1st January, 1814, assigned all the plaintiff's estates to the two defendants and three other creditors of the plaintiff, in trust for the creditors generally. At this time some doubt arose whether or not, on account of the peculiar tenure of the lands in Canada, the estates there had become actually vested in these five persons. To remove these doubts the defendants and the other creditors of the plaintiff, by a deed poll, dated 2d April, 1816, disclaimed (*b*) the property in Canada, and by an indenture of even date, the plaintiff covenanted that he would cause sale to be made of the estates in Lower Canada, and would stand possessed of the purchase moneys,

(*a*) Which provides (section 5) "that it shall and may be lawful for the Lord Chief Justice of the Court of K. B., the Lord Chief Justice of the Court of C. B., and the Lord Chief Baron of the Court of Exchequer, respectively to nominate and appoint a barrister, and each of them is hereby required so to do, for the purpose of taking into consideration applications in cases of imprisonment when the debt

shall amount to a sum exceeding 2000*l*., and of granting relief in the same according to the provisions of this act, under the authority of rules to be made in the said superior Courts, or by a judge's order at chambers, where it shall appear to them to be just and fitting."

(*b*) As to the sufficiency of the disclaimer of a freehold interest by deed, see 4 *Man. & Ryl.* 189 (*a*).

upon trust, after paying *Edine Henry* 600*l.* a year, as the agent or attorney of the property, and all charges and expenses attending the management of the estate, to pay *King* 340*l.*, the amount of his bill for the management of the estate in England; and in the next place, after retaining to himself the annual sum of 400*l.* for the management of the estates, upon trust to pay the surplus moneys to the two defendants and the other three trustees, who are since dead, to be applied by them to the payment of all the debts of the plaintiff incurred prior to 1813. No sale of the estates has been made by the plaintiff. *Henry* retained his 600*l.* a year, and the plaintiff 400*l.*, but no money has been paid to the defendants. It was likewise stated in the affidavit, that the action was brought for the purpose of intimidation, and to induce the defendants to execute a release of the covenants contained in the trust deed on the part of the plaintiff; that in consequence of the defendants' refusal to release the plaintiff, the plaintiff's attorney intimated that some strong measure would be adopted against them, as plaintiff's affidavit stated; that the action was brought to recover the sum of 6,734*l.* 15*s.* 10*d.*, money paid by *Henry*, as also for money paid by plaintiff, since February, 1813, for the prosecution of certain suits and appeals to the King in Council, for cutting timber from off the estate in Canada.

Sir *J. Scarlett*, *F. Pollock*, and *Hutchinson*, now shewed cause. This application does not purport to be made in order to prevent any grievous injury. The debt, it is true, is large, but the parties have been able to find bail, and therefore this is not such a case as will induce the Court to depart from its ordinary regulations. This is an attempt to try the merits of the cause upon affidavits. If the Court should now discharge the defendants upon filing common bail, the ultimate result would in all probability be materially affected, for a jury would be much influenced by such a decision here. This is not like the case of *Cham-*

1833.

BURTON

v.

HAWORTH
and KING.

1833.

BURTON
v.
HAWORTH
and KING.

bers v. Bernasconi (a), where an uncertificated bankrupt brought an action against his assignees. Here the plaintiff says that a sum is due, which the defendants deny. Upon this an action has been commenced, and should be allowed to proceed in the ordinary course. [*Patteson*, J. The last case in which the Court interfered, was one where the plaintiff had acknowledged, in writing, that the balance was against him.] In this case there is a material question between the parties, whether the estates in Canada ever passed to the assignees.

Campbell, S. G., *Holt*, and *Follett*, in support of the rule. The Court will not enter into the merits where the case is doubtful; but here the facts, as stated in the affidavits, shew clearly that the plaintiff can have no right of action against the defendants. In *Chambers v. Bernasconi* the Court of Common Pleas refused to set aside a rule obtained by the defendants to file common bail. In *Nizetich v. Bonacich* (b), the Court also interfered in a summary way. It is sworn that this action is brought for the purposes of intimidation. This is an action brought, in fact, by a *cestui que trust* against his trustee, for the recovery of moneys expended (not by the plaintiff, but by the agent of the estate,) in respect of the property. The plaintiff, according to his own statement, has no right of action.

LITLEDAL, J.—I am of opinion that the rule ought to be discharged. I thought at one time that this case depended upon the construction to be put upon the Insolvent Debtors' Act, but it is put now upon the ground that the process of the Court has been abused. Enough is not shewn to induce the Court to interfere. The affidavit filed by the defendant only states a threat to take some strong measures, and a belief that the action was brought in consequence of a refusal to comply.

(a) 6 Bingh. 498; 4 Moore & P. 218. (b) 5 Barn. & Ald. 904.

PATTESON, J.—We must always keep clear of cases like this, when the facts are complicated. If there be a real demand, I do not know that the Court would set aside the arrest on the ground of the intimidation.

1833.

BURTON
v.
HAWORTH
and KING.

TAUNTON, J.—I do not feel myself strong enough to decide a case like this, upon affidavits. The action may have been brought from improper motives, but this is not one of those cases in which it is clear that there is no right of action. Where the case is too clear and palpable to admit any possibility of contradiction, the Court will interfere. Here there is too much perplexity to authorize our interference.

Rule discharged.

HENSWORTH v. FOWKES.

THE declaration stated that the plaintiff was of good character, and until &c. had never been suspected of being guilty of felony or of having stolen goods concealed upon his premises, and was daily acquiring in his trade as a butcher great gains and profits: Yet the defendant contriving to bring the plaintiff into disgrace, and to cause his dwelling-house to be searched for stolen goods, and to cause him to be imprisoned, on &c. at &c. appeared before a justice of the peace, and falsely and maliciously, and without any probable cause, alleged that certain goods had been feloniously stolen, and that the defendant had probable cause to suspect and did suspect that the said goods were concealed in the dwelling-house of the plaintiff, and *upon such charge* the defendant procured the said justice to make his warrant to a constable to enter into the dwelling-house of the plaintiff, and there to search for the goods, and, if any should be found, to bring the goods so found, and the body of the plaintiff, before the said justice, to be dealt a sufficient allegation that he entered under the warrant. *Per Taunton Js.; dissentiente, Littledale, J.*


A count charging the defendant with having preferred a charge of felony against the plaintiff before a magistrate, and having, under a warrant to search the plaintiff's house for stolen goods obtained upon such charge, entered the plaintiff's house, may be joined with counts in tort. An allegation that the defendant entered the house to search for the said goods, is and *Patteson,*

1833.

HENSWORTH
v.
FOWKES.

with according to law. The declaration then proceeded in these words: "And the defendant then and there falsely and maliciously, and without any reasonable or probable cause whatsoever, and, together with divers other persons, falsely and maliciously, and without any reasonable or probable cause, caused and procured the dwelling-house of the plaintiff to be searched and rummaged for *the said* goods, by the defendant and the said other persons, and the door of the said dwelling-house being then and there of great value, to wit, of the value of 20*l.*, to be with force and arms broken to pieces, damaged and spoiled, and also a certain pantry of or belonging to the said dwelling-house also of great value, to wit, &c. to be demolished and broken; and also then and there caused and procured the plaintiff and his family to be greatly disturbed and disquieted in the possession of the said dwelling-house, and divers goods and chattels, to wit, certain cart-wheels of the plaintiff of great value, to wit, &c. to be taken and carried away." The declaration further stated that the defendant procured the warrant to be indorsed by a justice of the peace for the borough of Leicester, and caused the plaintiff to be arrested by his body and detained in prison for a long space of time, until the defendant procured the plaintiff to be carried in custody before two other justices of the peace, to be examined; and that in truth there were no stolen goods upon the premises, nor was the plaintiff guilty of any offence, and that the two last-mentioned justices discharged the plaintiff out of custody, and that the defendant had not further prosecuted his complaint. The second count stated, that the defendant, contriving as aforesaid, afterwards appeared before a justice of the peace for the county of Leicester, and without any reasonable or probable cause charged that he the defendant had probable cause to suspect, and did suspect that certain stolen goods, the property of the defendant, were concealed in the dwelling-house of the plaintiff, and procured a search warrant to be granted by the same justice for searching the premises of the plain-

1833.


HENS WORTH
v.
FOWKES.

tiff and apprehending him; and that the defendant, without any reasonable or probable cause, procured the warrant to be indorsed by justices of the peace for the borough of Leicester, who authorized execution thereof within the borough; and the defendant upon the said last-mentioned charge, without any reasonable or probable cause, caused the dwelling-house of the plaintiff to be searched for stolen goods. "And a certain door and pantry of and belonging to the same, and of great value, to wit, &c. to be demolished and destroyed." The second count further stated, that the defendant caused the plaintiff to be arrested and to be detained in prison twenty-four hours, at the expiration of which time the plaintiff was acquitted and discharged from such offence, and no further proceedings had therein, and in truth no stolen goods were concealed upon the said dwelling-house of the plaintiff. There were other counts, for falsely and maliciously, and without reasonable or probable cause, causing the plaintiff's house to be searched under a magistrate's warrant, and a general conclusion to these counts, and those objected to, that by means of the premises the plaintiff had been injured in his credit and brought into disgrace among his neighbours, and that he had been injured in his trade and business, &c. There was also a count in trover.

General demurrer to the declaration, and joinder.

White, in support of the demurrer. The grounds of the demurrer are, that the allegations respecting the searching and rummaging of the dwelling-house, the breaking of the door of the dwelling-house, and the breaking and demolishing of the pantry in the dwelling-house, are substantive charges of direct and immediate acts of trespass committed by the defendant, and are improperly joined with the remainder of the first count of the declaration, which is in case; and that there is a misjoinder in the declaration, by joining together complaints in trespass and in case. Case and trespass cannot be joined. Trespass lies for that

1833.

 HENSWORTH
 v.
 FOWKES.

which is on the statement of it manifestly illegal. Case for that which is not directly and obviously illegal, but only by consequence. In *Johnston v. Sutton* (a), which was an action on the case for a malicious prosecution before a naval court martial, it is said there is no similitude or analogy between an action of trespass or false imprisonment and this kind of action. An action of trespass is for the defendant's having done that which, upon the stating of it, is manifestly illegal. In *Morgan v. Hughes* (b), *Ashhurst, J.* says, "The general distinction is this: where the immediate act of imprisonment proceeds from the defendant, the action must be trespass and trespass only; but where the act of imprisonment by one person is in consequence of information from another, there an action upon the case is the proper remedy, because the injury is sustained in consequence of the wrongful act of that other." In *Savignac v. Roome* (c), the importance of preserving the boundaries between the different actions, and particularly between trespass and case, in the former of which if the plaintiff recover less than 40s. he is entitled to no more costs than damages, whereas a verdict with nominal damages only, in case, carries all the costs, was pointed out by *Lord Kenyon, C. J.* [*Taunton, J.* I do not think that you need labour that point (d).] It is not alleged in the first count, that the defendant caused the dwelling-house of the plaintiff to be searched by virtue of any warrant, or that the door of the dwelling-house or the pantry was broken for the purpose of executing any warrant; nor is it even alleged that the defendant, when he did these acts, was accompanied by a constable; in which case it might have been presumed that he acted in aid of the constable. It makes no difference in this case, that it is averred that the defendant falsely and maliciously, and without any reasonable or probable cause, caused the dwelling-house to be searched. The same words occurred in the declaration in *Bracegirdle v. Orford and*

(a) 1 T. R. 544.

(b) 2 T. R. 231.

(c) 6 T. R. 125.

(d) *Vide post*, 329.

others (a), and in that case the question was whether the action should be brought in case or trespass, and it was held that the latter form of action was the proper remedy. [*Patteson*, J. There is one word of reference. It speaks of *the said goods*.] Search may have been made for *the said goods*, but no search is alleged to be made for the said goods *by virtue of any warrant*. In *Flewster v. Royle* (b), an action of trespass and false imprisonment was brought for giving information to a pressgang, and causing the plaintiff to be impressed. *Garrow*, for the defendant, made two points, one of which was, that the action should have been case, and not trespass. Lord *Ellenborough*, in giving judgment, said, "This is not like a malicious prosecution, where the party gets a valid warrant or writ, and gives it to an officer to be executed. There was clearly a trespass here in seizing the plaintiff, and the defendant therefore was a trespasser in procuring it to be done." Here, therefore, a trespass was committed in causing the house to be ransacked, as it was done without warrant. Assuming that the warrant issued, and that the defendant acted under it, he would not be justified in demolishing the door and pantry, as stated in the declaration. The injuries are consequently those for which trespass is the proper remedy. There is, therefore, a misjoinder of trespass and case.

R. V. Richards contra. Trespass and case cannot, it is admitted, be joined. The demurrer is to the whole of the declaration, and not to a particular count. Examining the whole of the declaration from the commencement to the conclusion, which alleges injury to the credit of the plaintiff, it will be found to be framed in case, although some statements may be informally made. *Elsee v. Smith* (c) was an action for procuring a search warrant without probable cause of suspicion, and for apprehending the plaintiff upon it. The action was brought in case. Lord *Tenterden*, in giving judgment in that case, says: "Looking to the whole

(a) 2 M. & S. 77. (b) 1 Campb. 187. (c) 2 Chitty Rep. 304.

1833:

HENSWORTH
v.
FOWKES.

1833.

~
 HENSWORTH
 v.
 FOWKES.

declaration, the inducement, and the matters charged in the conclusion, it appears to be very manifest that the plaintiff does not seek damages for the taking of his goods; but he seeks damages for the injury done to his reputation, and the imprisonment of his person, and therefore I think the verdict was correctly taken." So in this case the plaintiff claims compensation for the injury done to his reputation, and taking the whole declaration together, it is framed in case. It appears from the case of *Courtney v. Collett* (a), that the insertion of the words *vi et armis* in a declaration will not cause it to be considered as an action of trespass. The declaration, after stating the procuring of the warrant, alleges that the defendant caused the dwelling house to be searched for the *said* goods. This must mean the goods in respect of which the search warrant was obtained, and it is therefore to be inferred, that at this time the defendant was acting under the authority of the warrant. The case of *Bracegirdle v. Orford and others*, is an authority for the plaintiff. The false charge in that case was held to be only matter of aggravation, and a party may if he pleases waive the trespass, and bring his action in case for the consequential injury, *Dix v. Brooks* (b), *Branscombe v. Bridges and another* (c), where it was said by the Court, "supposing that trespass would lie, still the plaintiff was at liberty to waive the trespass and bring an action on the case." [*Taunton, J.* According to your argument, a person who had been assaulted might waive the trespass and bring case. So that if he only recovered one shilling damages he would be entitled to costs]. In *Moreton v. Hardern* (d), *Holroyd, J.* says, "In cases where there is no ground of action except the trespass, perhaps case will not lie, but when an actual damage has been sustained, the trespass may be waived, and an action is maintainable on the special circumstances of the case, as in *Pitts v. Gaince*" (e). In trover the conver-

(a) 1 *Ld. Raym.* 272—4.& *Cress.* 145.(b) 1 *Stra.* 61.(d) 4 *B. & C.* 228.(c) 2 *Dowl. & Ryl.* 256; 1 *Barn.*(e) 1 *Salkeld*, 10.

sion may be the actual taking of the goods, yet there the trespass may be waived; and in other cases that which is an aggravation of the trespass may be the subject of an action on the case. This brings the case back to the original question, whether the whole count is not substantially in case, though some parts may be informally stated. If that be so, the demurrer being general, the plaintiff is entitled to judgment; *Orton v. Butler* (a), and *Samuel v. Judin* (in error) (b). In this case the wrong act complained of was the obtaining the warrant, and the gist of the action is the consequential damage which ensued.

1833.

 HENSWORTH
 v.
 FOWERS.

White, in reply. A general demurrer is the proper course in a case of this sort; *Orton v. Butler*, *Brigden v. Parke* and others (c). *Patteson*, J.] There is no doubt upon that point.] It was said that a party might waive trespass and bring case; but here, the party, so far from waiving the trespass, has actually declared upon it. The case of *Elsee v. Smith* is very different. There, every thing was stated to have been done under colour and pretence of the warrant. The declaration, it may be true, does not allege that precisely; but it states that the defendant caused and procured the plaintiff to be carried before the justice, who heard all that the defendant could say touching the said supposed offence, and adjudged that he was not guilty thereof, and that the defendant had abandoned the prosecution of the complaint. What was alleged to have been done there, therefore, might fairly be presumed to have been done by virtue of the warrant. All that was decided in that case was, that if a party applies to a magistrate for a warrant without probable cause, he is liable to an action on the case and not of trespass. That is very different from the point raised here. Here, there is a separate averment of something independent of the warrant; and as far as this goes the declaration is in trespass and not in case. The

(a) 1 Dowl. & Ryl. 282.

(c) 4 Bos. & Pul. 424.

(b) 6 East, 333.

1853.
 HENSWORTH
 v.
 FOWKES.

conclusion of *per quod &c.* in an action of trespass, does not make it case.

LITTLEDALE, J.—I must own that I think that the demurrer was well founded. It does not appear to me to be sufficiently alleged that any thing was done in pursuance of the warrant. If it had appeared that the constable was one of the party entering the house, that might have been sufficient to connect the entering and subsequent act with the warrant. The only words which refer to the warrant are '*the said goods*,' but consistently with this allegation, the defendant might have put the warrant in his own pocket instead of delivering it to the constable, and have gone with others and committed the trespass. I have no doubt that it was actually done under the warrant, but that is not sufficiently stated in the declaration. With regard to the argument that the whole of the declaration must be looked at, I cannot say upon the whole that it is in case. It is said you may go for the consequential damages without laying your action upon the particular circumstance. If that were allowed, a man might bring an action for an assault in case and recover for the consequential damage. That which is stated exclusively of the acts which are not alleged to have been done under the warrant, does not constitute a cause of action. The merely going before the magistrate and making the statement mentioned in the early part of the declaration is not enough to support an action on the case. Upon the whole, I think the searching in the dwelling-house is not sufficiently connected with the warrant. A general demurrer is the proper course in this case.

TAUNTON, J.—I have entertained some doubt during the argument, but I think that the acts alleged in the declaration may without impropriety be referred to the words '*such charge*,' and that the whole cause of action, as stated in the declaration, is in case. I cannot, however, adopt all the arguments used for the plaintiff. If there be a misjoin-

der, it may be taken advantage of by general demurrer, as it would be ground for a motion in arrest of judgment (a). It was said, that supposing that the cause of action was in trespass, the plaintiff might waive the trespass and bring case. If the doctrine of waiver were applied to the extent contended for, the distinctions between forms of action would be lost, all actions would be amalgamated, and all clearness and distinctness would be lost in pleading. There is no decided case either on one side or on the other. I think the declaration sufficient. It first states that the defendant falsely and maliciously, and without any reasonable or probable cause, charged and alleged that the goods therein named had been feloniously stolen, and that he the defendant suspected that the goods were concealed in the dwelling house of the plaintiff, and that upon such charge the defendant caused the justice of the peace to grant his warrant to enter into the dwelling house of the plaintiff to search for the said goods, and to bring the body of the plaintiff and the goods, if found, before the justice. I think what follows should be read thus: and *upon such charge* (falsely and maliciously &c., I reject as a mere parenthesis,) the defendant caused and procured the dwelling house of the plaintiff to be searched and rummaged for *the said goods*. The searching and rummaging for *the said goods*, is clearly meant to be, in pursuance of the said warrant. 'Defendant and others,' was probably a mistake for 'the constable and others.' These acts of searching and rummaging for the goods, breaking the door of the plaintiff, and demolishing and breaking to pieces the pantry, if done under the warrant and bonâ fide for the purpose of executing such warrant, would not form the subject-matter of an action of trespass, though it might be matter of aggravation. The declaration then goes on to state, that they took certain goods of the plaintiff, and then got the warrant indorsed, and caused the

1833.

 HENSWORTH
 v.
 FOWKES.

(a) Whatever objection to the declaration is a ground for arresting the judgment, will entitle the defendant to judgment on general demurrer; but the rule does not hold e converso.

1833.
 HENSWORTH
 v.
 FOWKES.

plaintiff to be arrested, and that he was discharged. Putting all the particulars together, I think there is no great stretch of construction in saying, that the sequel was done in pursuance of the charge. Looking at the conclusion of the declaration, it appears that the damage relates to the injury done to the plaintiff's reputation, in consequence of the false and unfounded charge, and not at all to the violence.

PATTESON, J.—I am also of opinion that there is no misjoinder, though I have entertained considerable doubts upon this point. If there had been a misjoinder it would have been clearly bad, as well on general demurrer as in arrest of judgment. I do not think the demurrer need have been special. The general demurrer is the proper form for raising a question of whether there is a misjoinder or not. This is the whole question here; and in inquiring we are not to look at any particular part, but at the whole together,—and upon the whole, I think that the 6th count is a count in case. If there had been a special demurrer to this part of the count the case might have been otherwise. I think that all that is alleged in the count is referable to the warrant. The gravamen is the going before the magistrate and making the charge without reasonable or probable cause. If the acts done were done under the warrant, it is quite clear that the parties would not be liable to an action of trespass. I think that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

White applied for leave to amend.

LITTLEDALE, J.—That certainly cannot be permitted. That is never done after the case has been fully gone into (a).

(a) *Tamen quare.*

1833.

The KING v. The Justices of HERTFORDSHIRE.

A Rule had been obtained, calling upon the justices of Hertfordshire to shew cause why a mandamus should not issue, commanding them to enter continuances and hear an appeal against a poor-rate. At the sessions to which the appeal was made, the respondent prayed a respite of the appeal to the next sessions, which, after argument, the Court granted upon payment of costs. The notice of appeal was then handed in to the clerk of the peace, in order that he might draw up the order of the Court for the respite. At the following sessions, the order, which recited the notice of appeal, was put in. The respondents contended that notwithstanding the respite, the appellant was bound to prove the service of the notice of appeal. The Court were of this opinion, and the appellant being unable to prove the service of the notice, the appeal was dismissed.

After an appeal against a poor-rate has been respited at the instance of the respondents, the appellant cannot be called upon to prove his notice of appeal.

Ryland now shewed cause. It was incumbent upon the appellant to prove the service of the notice, if called upon to do so, because the sessions have no jurisdiction but by the notice of appeal. The handing in of the notice of appeal to the officer of the Court was no waiver of the right to object to the sufficiency of the notice.

Platt, contra. The respondents admitted that the notice of appeal was sufficient when they applied for and obtained the order for a respite; because if the notice was not valid, the Court had no jurisdiction to make an order in the matter.

By the COURT.—The respondents have admitted the jurisdiction of the sessions; they have acted upon it, and cannot now dispute it.

Rule absolute.

1833.

LAMEY v. BISHOP.

Under 9 Geo. 4, c. 15, a record may be amended pending the trial, by correcting a variance between a written contract and the statement of the contract on the pleadings, although it do not appear by the record that the contract was in writing.

ASSUMPSIT. The declaration stated, that "in consideration that the plaintiff would sell to the defendant certain stock of the plaintiff, to wit, stock in the cellars of the plaintiff, agreeably to an inventory thereof taken by one Mr. *Wilson*, upon certain terms, to wit, for the sum of 600*l.*, with the exception of the wine in No. 1 binn, amounting to 8*l.* 9*s.*, to be paid for by approved bills falling due *before* the 15th day of February, 1832, the plaintiff to have security on the whole of the said stock in the said cellars till the whole sum of 600*l.* should be duly paid, interest to be allowed on the bills till received, he, the defendant, undertook and promised the plaintiff to pay him the said sum of 600*l.* by approved bills falling due *before* the 15th day of February, 1832." The declaration then averred the readiness of the plaintiff to receive the bills, his willingness to perform the terms of the contract, and a breach by the defendant. Plea: non-assumpsit. At the trial at the sittings after Michaelmas term, 1832, the plaintiff, to prove the contract, put in the following memorandum, signed by the defendant and given by him to the plaintiff's agent:

"Sir,—I hereby agree to purchase the stock in the cellars of Mr. *J. T. Lamey*, at Great Windmill Street, agreeably to the inventory taken by Mr. *Wilson*, for the sum of 600*l.*, with the exception of the wine in No. 1 binn, amounting to 8*l.* 9*s.*, to be paid for by approved bills falling due *by* the 15th day of February, 1832: *J. T. Lamey* to have security on the whole of the stock in the cellars till the whole sum of 600*l.* is duly paid: interest to be allowed on the bills till received.

Thos. Bishop.

12th Nov. 1831."

It was objected, on the part of the defendant, that the contract set out in the declaration varied from the memo-

randum, inasmuch as by the former the bills of exchange were to become due *before* the 15th of February, 1832, but by the terms of the latter the bills were to become due *by* the 15th of February, 1832. Upon this the declaration was amended by the direction of the learned Chief Justice, in pursuance of 9 Geo. 4, c. 15 (a), by substituting the word "by" for the word "before," where it was necessary, and an order was made for the amendment. A verdict was found for the plaintiff, damages 104*l.* (b); and leave was given to the defendant to move to set aside the verdict and enter a nonsuit, if the Court should think that the learned judge had no power to amend the record in this case.

1833.

 LAMEY
 v.
 BISHOP.

Biggs Andrews now moved accordingly. This is not a case within the statute: it is not a variance between a writing produced in evidence and the recital or setting forth thereof upon the record, but is a variance between a written contract produced in evidence and the allegation of a contract in the declaration. If the evidence produced

(a) That statute enacts, "that it shall and may be lawful for every court of record holding plea in civil actions, any judge sitting at nisi prius, and any court of oyer and terminer and general gaol delivery, in England, Wales, the town of Berwick upon Tweed, and Ireland, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such judge or court in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence and the recital or setting forth thereof upon the record whereon the trial is pend-

ing, to be forthwith amended in such particular by some officer of the court, on payment of such costs, if any, to the other party, as such judge or court shall think reasonable; and thereupon the trial shall proceed as if no such variance had appeared: and in case such trial shall be had at nisi prius, the order for the amendment shall be indorsed on the postea, and returned together with the record; and thereupon the papers, rolls and other record of the court, from which such record issued, shall be amended accordingly."

(b) Leave to move to reduce the damages was reserved upon a collateral point.

1833.

LAMEY

v.

BISHOP.

had been parol evidence, not in writing, it is quite clear that it could not have been amended; and the circumstance of its being in writing cannot alter the case. In the case of *Ryder v. Malbon* (a), where no written agreement was set out on the record, and a lease, which was given in evidence, shewed that the terms of the plaintiff's holding were different from those alleged in the record, Mr. Justice Park refused to allow the plaintiff to amend, and said—"I am of opinion that this act of parliament only applies to cases where some particular written instrument is professed to be set out or recited in the pleadings." In the present case the declaration was not upon the written agreement, but merely stated the promise from the written agreement. [*Taunton, J.* Suppose the plaintiff declares upon the contract, stating it to have been by agreement in writing. In such a case you admit that the act would apply. Would it not be absurd to say that because the unnecessary words, "by agreement in writing" (b), are omitted, therefore the act does not apply?] The terms of the act do not apply to cases where no writing is recited or set forth on the record. In a late case before the Chief Justice of the Common Pleas at Nisi Prius, it was held that the Court could not amend where it would be necessary to amend the agreement likewise. That case is substantially the same as the present.

Cur. adv. vult.

In the same term, DENMAN, C.J., said—In the case of

(a) 3 Carr. & Payne, 595.

(b) In declaring upon a contract which, by the statute of frauds, cannot be enforced unless it be in writing and signed, the circumstances of writing and signature need not be noticed: 1 Wms. Saund. 211 b, 276 c. So a feoffment may be pleaded as at common law; *Read v. Brookman*,

3 T. R. 156; though under the statute it will be invalid, unless it be written and signed. It need not, however, be under seal, whether an estate of inheritance or merely a life estate is to be passed. At common law, a verbal feoffment was sufficient; and the statute requires only the signature not the seal of the party.

Masterman v. Judson (a), the Court of Common Pleas decided that a judge at Nisi Prius has power to make such an alteration. We think there must be no rule in this case.

1833.

LAMEY
v.
BISHOP.

Rule refused (b).

(a) 8 Bingham. 224.

(b) In *Reeves v. Scott*, 1 Chit. Plead. 5th ed. 349, n., and *Jelf v. Oriel*, *ibid.*, Lord Tenterden, C. J.

sitting at Nisi Prius, refused to amend mistakes which had been occasioned by gross carelessness.

THE KING v. THE COURT OF DIRECTORS OF THE EAST INDIA COMPANY.

IN Michaelmas term last, *Horne, A. G.*, obtained a rule calling upon the Court of Directors of the United Company of Merchants trading to the East Indies, to shew cause why a writ of mandamus should not issue, commanding them to send out to the Governor-General in Council at Fort William, in Bengal, a certain dispatch relative to the claims of the trustees of *William Palmer & Co. of Hyderabad*, against *Mooneer Ool Moolk*, as altered and approved by the Court of Commissioners for the affairs of India, on the 14th day of May last.

The following facts appeared by the affidavits:—Certain persons trading under the firm of *W. Palmer & Co.* in 1814, formed a commercial establishment, and have since carried on business at Hyderabad, a place in the East Indies, which was not within the territories of the East India Company, but in those of the Nizam, one of the native princes in alliance with the Company. *Palmer & Co.* having stopped payment, and debts being due to them by *Mooneer Ool Moolk*, the chief minister of the Nizam, and other persons his subjects, the Company, with a view of assisting the estate of *W. Palmer & Co.* in recovering either on the ground that the matter of such dispatch is purely commercial, or on the ground that the Board of Control may itself originate a dispatch in the form to which this dispatch has been altered, and that they have rescinded the resolution upon which the original dispatch was framed.

Where the Directors of the East India Company transmit to the Board of Control a dispatch headed "Political Department," and upon alterations being introduced by the Board, discuss those alterations upon the merits without asserting that the matter of the dispatch is not connected with the civil or military government or the revenues of India, the Directors cannot refuse to transmit such altered dispatch to India,

1833.

 The KING
 v.
 EAST INDIA
 COMPANY.

those debts, in March last framed a dispatch to be sent to their resident at the court of the Nizam, directing him to advise the Nizam to concur in settling the affairs of *W. Palmer & Co.* The draft of this dispatch was headed "*Bengal Political Draft, No. 167,*" and on the 20th March a resolution approving of the draft was passed by the court. On the same day the dispatch, headed "*Political Department*" was sent by the Directors to the Board of Control, for their consideration and approbation, in pursuance of the 12th section of the 33 *Geo. 3, c. 52.*

On the 3d of April the Board of Control returned the draft with some alterations, giving to the Directors, under the hand of their chief secretary, their reasons at large for making such alterations.

The Court of Directors considering that the dispatch was not one which related to the civil or military government or revenue, objected to the alterations, and on the 28th May sent the dispatch back to the Board of Commissioners, accompanied with a statement of their objections to the alterations made in the draft, according to the provisions of the 13th section of the act.

On the 14th May, 1832, the Board of Control took into consideration the representation of the Court of Directors, and transmitted the draft, altered, back again to them.

Further discussions took place between the Court of Directors and the Board of Control, the former continuing to urge objections, and the latter refusing to alter their determination.

On the 8th of August the Court of Directors resolved that their original dispatch did not relate to the civil or military government or revenue of India, and rescinded the resolution of March upon which the dispatch had been framed.

A further correspondence took place between the Court of Directors and the Board of Control, and the last letter was from the Directors to the Board of Control, and dated 22d November. In the course of this discussion the

Directors requested the Commissioners to originate the dispatch themselves under the 15th section of the act, and stated that they, the Directors, wished to have nothing to do with it.

The question arose upon the construction of the act of 33 Geo. 3, c. 52, in which the 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th sections were more particularly taken into consideration.

By the 2d section of the act, certain public officers are appointed commissioners for the affairs of India, who are usually denominated the Board of Control.

By the 9th section, those commissioners are invested with full power and authority to superintend, direct, and control all acts, operations and concerns, which in anywise relate to or concern the civil or military government, or revenues of the territories and acquisitions of the East India Company in the East Indies, subject to the particular directions in the act.

The 11th section requires the Directors of the East India Company to deliver to the Board of Control copies of all minutes, orders, resolutions and proceedings of all Courts of Proprietors and Courts of Directors, and also copies of certain documents received from abroad.

The 12th section directs that no orders or instructions relating to the civil or military government, or the revenues of the territorial possessions of the East Indies, shall be sent or given to any of the governments in India by the Court of Directors, until the same shall have been submitted for the consideration and approval of the Board of Control; and that copies of all orders and instructions which the Court of Directors shall purpose to be sent to India, shall be by them previously laid before the Board of Control, and that within the space of fourteen days, the Board of Control shall either return the same to the Directors with their approbation; or if the Board shall disapprove, alter or vary in substance any of the proposed orders or instructions, the Board shall give in writing under the hand

1833.
The KING
v.
EAST INDIA
COMPANY.

1833.

The KING
v.
EAST INDIA
COMPANY.

of the chief secretary of the Board, by order of the Board, their reasons at large in respect thereof, together with their instructions to the Directors in relation thereto, and that the Directors shall forthwith dispatch and send the letters, orders and instructions, in the form approved by the Board, to the proper governments or officers in India without further delay, unless upon any representation made by them to the Directors, the Board shall order any alteration to be made therein; and the Directors shall pay obedience to and be governed and bound by such orders and instructions as they shall receive from the Board of Commissioners, touching or concerning the civil and military government of the possessions of India, and the revenues of the same.

The 13th section authorises the Directors to make representations in writing to the Board of Control, touching or concerning any letters, orders or instructions, which shall have been varied in substance or disapproved by the Board; and the Board are required to take these representations into consideration, and to give such further orders and instructions as they shall think fit and expedient; which orders and instructions are to be final and conclusive upon the Directors.

The 14th section reserves to the Court of Directors the exclusive right of nominating the servants of the Company.

By the 15th section, if the Court of Directors shall neglect to frame and transmit to the Board of Control, dispatches on any subject connected with the civil or military government, or revenues of India, beyond fourteen days after requisition made to them by order of the Board, the Board may prepare and send to the Directors, without waiting for the receipt of the copies of the dispatches intended to be sent by the Directors, any orders or instructions for any of the governments of presidencies in India, concerning the civil or military government or revenues, and the Directors are required to transmit dispatches according to the tenor of the said orders or instructions so transmitted to them by the said Board, unto the respective governments.

and presidencies in India, unless upon any representations made by the Directors the Board shall alter them; which directions the said Court of Directors shall in such case be bound to conform to.

The 16th section restricts the Board from issuing or sending orders or instructions which do not relate to the civil or military government or revenue, and from expunging, varying or altering dispatches proposed by the Directors, which do not relate to the government or revenues, and directs that if the Board shall send any orders or instructions to the Court of Directors, to be by them transmitted, which in the opinion of the Court of Directors shall relate to points not connected with the civil or military government or revenues, then the Court of Directors may apply by petition to his Majesty in Council, and his Majesty in Council shall decide whether the same be or be not connected with the civil or military government or revenues of the territories in India; which decision shall be final and conclusive.

Spankie, Serjt., Sir James Scarlett, Wigram, and Follett, now shewed cause. There are three points to be considered. First, whether this is a dispatch relating to the civil or military government of India. Assuming that it is a dispatch relating to such matter, the second point is, whether it was competent to the Directors to rescind the resolution which they had originally made. The third point is, whether this is a case in which the summary jurisdiction of the Court by mandamus ought to be exercised. The object of the 33 Geo. 3, c. 52, upon the 12th (a) and 13th (b) sections of which the application is founded, was to settle the mode in which the possessions belonging to Great Britain in the East Indies should be regulated. It was the intention of the legislature, that every thing relating to the civil and military government of India, and the revenues, should be subject to the superintendence of the Board of Control,

(a) *Ante*, 337.

(b) *Ante*, 338.

1833.

 The KING
 v.
 EAST INDIA
 COMPANY.

but that every thing relating to trade should be left entirely to the management of the Court of Directors. Every dispatch, of whatever nature, is sent to the Board of Control, as it would otherwise be impossible for them to exercise a proper control over the affairs of India.

First point—
 Whether the
 dispatch had
 a political ob-
 ject.

I. The whole object of the dispatch is, to request the Nizam to use his influence with some of his own subjects to induce them to settle by arbitration, or in some other mode, the accounts subsisting between them and certain persons carrying on business in his capital—a mere substitute for a lawsuit. This dispatch is not made with reference to any political object. It is not a request to the Nizam to do any thing in relation to the Company, or for their benefit; nor does it concern, in any way, the Government of the British territories in India. It is perfectly clear that the Board of Control have no power to interfere at all, unless the dispatch refer to the Government of India. The 12th section, therefore, cannot apply in a case where it is a question whether the dispatch relates to the Government of India or not. It cannot have been contended that this question should be decided here: it was left to another tribunal to say whether a dispatch relates to the Government of India or not.

Second point
 —Power of
 rescinding
 dispatch.

II. Under the 11th (a), 12th (a), 15th (b), and 16th (c) sections, dispatches touching the civil or military government or resources of India may originate in two modes. If the measure appear to the Directors to relate to the Government, they may originate a dispatch, and transmit it to the Board, who have an undoubted right to alter it; and the dispatch, when altered, is transmitted by the Directors to India. That is the usual mode. There is also another mode which the Act contemplates. If the Directors neglect or refuse to originate a dispatch relating to the Government, after having been called upon

Two modes of
 originating
 dispatches.

(a) *Ante*, 337.

(c) *Ante*, 339.

(b) *Ante*, 338.

to do so by the Board, the latter may, after the lapse of fourteen days, themselves originate a dispatch; but if the Directors think the dispatch originated by the Board does not relate to the revenues or Government of India, they may appeal to the King in Council to determine how far such dispatch relates to the Government or revenue. On the other hand, no appeal is given where the dispatch originates with the Directors; and yet the Board of Control have the power of treating as a political dispatch that which was never intended as such by the Directors, or of so altering a dispatch relating to trade as entirely to change its nature and convert it into a political dispatch. This dispatch so altered, it is contended, the Board may compel the Directors to send to India with their name and upon their own responsibility. The proper course for the Board to pursue under this Act, would be, in such case, to originate a dispatch themselves, as they are impowered to do, and thus to give the Directors the opportunity of appealing, if they think proper, and at all events to take from them the responsibility which they might incur by sending in their own name a dispatch which is virtually not their own. The object of the statute was to obtain the concurrence of both parties, if they were disposed to concur; and it could never have been the intention of the legislature to give to the Board of Control the power of so far altering a dispatch as to make it wholly different from what it was in its original shape. If that were so, it would enable the Board to practice a species of trick upon the Directors; and, by totally changing the nature of a dispatch, to make the Directors in effect concur in a dispatch which, perhaps, their judgment entirely condemned. There is no inconsistency in supposing that if a dispatch has been inadvertently framed by the Directors, and the Board make an alteration which causes the Directors to think that the measure was inexpedient, they shall be at liberty to recal their dispatch by rescinding the original resolution approving of the dispatch. Suppose also the case of a change of circumstances in the interval between the original framing of

1833.

 The KING
 v.
 EAST INDIA
 COMPANY.

1833.
 The KING
 v.
 EAST INDIA
 COMPANY.

the dispatch and its return approved by the Board, or of circumstances coming to their knowledge of which they were not aware at the time of originating the dispatch, and which would have induced them to adopt different measures, are the Directors then peremptorily obliged to send the dispatch merely because it has once left their office and come to the hands of the Board of Control? In such case, the Directors may well be permitted to annul the dispatch entirely. There is nothing in the Act which in terms prevents the Court of Directors from rescinding the resolution approving of the dispatch. They cannot repudiate any dispatch initiated by the Board. At the same time, they have in this case a power of appealing. Not one word in the Act restrains the Directors from rescinding their own resolution. One clause in the Act illustrates this argument. It is expressly provided that no *Court of Proprietors* shall rescind, revoke, or vary any resolution of the *Court of Directors*, relating to the civil or military Government, or the revenues of India, after it shall have received the approbation of the Board of Control (a). Does not this afford a presumption that in a case like the present, the Court of Directors have the power of rescinding their own resolution? It is quite unnecessary, upon the policy of the Act, to infer that the Board should have the power of compelling the Directors to transmit an altered dispatch; for the Board themselves may, at any time, exercise the control which it was intended that they should have, by initiating a dispatch themselves. On the other hand, if the Court of Directors have neither the power of appealing, nor of rescinding the resolution in the case of an altered dispatch being sent to them, it would be in the power of the Board to assume a jurisdiction over matters in which it was never intended they should interfere, by making any alterations which they chose in dispatches relating merely to trade or the private affairs of the Company, and then compelling the

(a) Section 23.

Directors to send the dispatch so altered. When the Board wish a particular dispatch, relative to the political affairs of India, to be sent, they may require the Directors to frame a dispatch accordingly: this the Court of Directors may refuse to do; and in case of neglect for the space of fourteen days, the Board may themselves originate the measure, by sending orders and instructions for a dispatch. Now if the Directors may refuse to frame a dispatch, according to the requisition of the Board, surely there is nothing in the policy of the Act which forbids them to rescind a resolution upon which a dispatch is grounded that has since been altered by the Board. It may also be suggested, that if the true construction be that the Directors shall not rescind, it must also follow that the Board cannot rescind dispatches originating with themselves; for the words by which the power of originating is given to each are similar: yet there may be circumstances—such, for example, as the breaking out of a war in Europe—which would make it an imperative duty in the Board of Control to change the line of their political measures with regard to our Indian territories. That the power of appealing is not given in any case except where the dispatch is the dispatch of the Board, will appear from an examination of the several sections by which the appeal is given, or which bear upon the question. Every thing relating to the Court of Directors originating, and the Board of Control altering, is contained in the 12th and 13th sections. The 14th section provides that the power of altering given to the Board shall not extend to empower them to nominate any of the servants of the Company. Then comes the 15th section, giving the power of originating to the Board; and the words used are, that the Board may “prepare and send to the said Directors any orders or instructions for any of the Governments or Presidencies in India,” concerning the civil or military Government or revenue; and the Directors are required to transmit dispatches according to the tenor of the said *orders and instructions*. Then comes the 16th section, the former part

1855.

 The KING
 v.
 EAST INDIA
 COMPANY.

1833.

 The KING
 v.
 EAST INDIA
 COMPANY.

of which directs that the Board shall not send any *orders and instructions* which do not relate to points connected with the civil or military Government or revenues of India, nor to *expunge, vary, or alter* any dispatches proposed by the Directors, which do not relate to the said Government or revenues. It is by the latter part of this section that the appeal is given; and it will be seen that here nothing is said of any alterations of dispatches, but it is only provided that "if the said Board shall send any orders or instructions to the said Court of Directors," to be transmitted by them, which, in their opinion, do not relate to the Government or revenues, then they may appeal. It was very proper to give the appeal only in the one case; for where the dispatch was originally the dispatch of the Directors, the legislature may have intended that they should have the power of rescinding a dispatch which, though altered, still remained their own; but as they could not annul a dispatch transmitted by the Board of Commissioners, it became necessary to give them the power of appealing in case the dispatch appeared to them to relate to affairs not properly under the management of the Board of Control.

The case of *Rex v. East India Company* (a), upon which this rule was obtained, is not in point; for in that case the original resolution approving of the dispatch had never been rescinded, as was done here.

Third point—
 Whether mandamus lies.

III. This is a case in which the Court cannot interfere by mandamus. If there be any doubt in the case, the Court will leave the Board of Control to the remedy which they clearly have, by *originating* a dispatch under the 15th clause of the Act. There is another objection to the issuing of the mandamus, namely, that in this case the affidavits show no refusal to transmit the dispatch.

Horne, A. G., Campbell, S. G., and Amos, contra. No

(a) 4 M. & S. 279.

sufficient cause has been shewn why a mandamus should not issue, unless the Court should think proper to adopt the course which was taken in the case in Maule and Selwyn's Reports (a), which was to give the other side a reasonable time to appeal to the King in Council. To such a course no objection will be made by the Board. The Board have not any other remedy than that by mandamus, for that which is spoken of as a remedy is not a remedy in this, but in another case. This is the only mode by which the Board can compel the sending out of the amended dispatch itself.

1833.

The KING
v.
EAST INDIA
COMPANY.

Mandamus.

Now, with respect to the power of appeal. If, as is contended, the appeal was given only in the case of a dispatch originated by the Board, the Directors would be in a much worse situation than that in which it was the intention of the act to place them. From the case in Maule & Selwyn, it evidently appears that there is in the present case a power of appeal. In that case the dispatch had originated with the Court of Directors; the Board had altered it; and the Directors had refused to transmit it. This Court gave time to the Directors to appeal to the Privy Council; from which it is to be inferred that this Court was of opinion that a power of appealing in such case was given. The Directors appealed accordingly, and the appeal was entertained by the Privy Council, who, by so doing, decided that they had jurisdiction. It has been contended, upon the literal construction of the act, there is no appeal given in this case. If the act is to be literally construed, then it may be said that in a case such as the present the Directors have only to obey without any qualification, and without its being in the power of any court of justice in this kingdom to relieve them. Upon a literal construction also, the Board have not that other remedy which is attributed to them, inasmuch as the power of initiating by themselves is given only in the case of neglect or refusal, on the part of the Directors, to frame a dispatch

Appeal.

(a) 4 M. & S. 279.

1833.

 The KING
 v.
 EAST INDIA
 COMPANY.

Power of
 rescinding.

within a certain time after notice; and the Directors in this case have not refused or neglected, but have actually framed a dispatch, which has been duly sent to the Board and has been amended by them. This difficulty, however, it is attempted to remove by the expedient of rescinding the resolution, and thus, as it is supposed, inducing a state of things in effect the same as a neglect to frame in the first instance. This cannot be so. The act gives to the Board a power of originating only in the event of the Directors not doing their duty in the first instance. The Directors here did their duty by transmitting to the Board of Control a dispatch, and thus have not afforded to the Board an opportunity of originating. The Directors are to be the first to move; they have done so. But now it is attempted, by a subsequent act, to charge themselves with gross neglect, *ab initio*, although in fact they had actually done their duty. If the Directors, by rescinding the resolution, may totally annihilate the dispatch now, they might do it after the ship by which it is in the course of transmission to the East Indies has crossed the line; for there seems to be no ground for supposing that if they may do it on shore a week after the Board have sent their order (which the act says is to be obeyed), they may not also do it a month afterwards, while the ship is on her voyage. It is said that this rescinding is tantamount to a refusal to frame a dispatch. If that be so, it is also something more: it is also an abrogation of the order of the Board of Control. During the interval between the return of the amended dispatch and the rescinding of the resolution, the order of the Board of Control is final; and according to the argument propounded, the Directors have thus a power to rescind not only their own resolution, but the order of the Board of Control. By the act they are required to transmit the dispatch immediately upon receiving it from the Board. If they do not, they are guilty of disobedience. This disobedience they would purge by at once blotting out the whole proceedings, and making them

as if they had never taken place. It is clear that the alterations made by the Board are in effect "orders and instructions" sent by them to the Directors, although not exactly in the form described in the act. The argument is, that the orders and instructions of the Board are not such until the whole business is completed. This is not so. The orders and instructions mentioned in the 12th section are such the instant they are sent by the Board; and in the present case they are sent with this addition to their weight, that they are sent after the matter has undergone a protracted discussion and mature consideration. Now, Appeal. with respect to the application of this principle: the case decided by Lord *Ellenborough* was precisely the same as this, yet there Lord *Ellenborough* entertained no doubt of the power of appealing as against *orders* and *instructions* of the Board, and when the case came to be deliberated upon by the Privy Council, no doubt was entertained there. The appeal, it is clear, was intended to be given in both cases; for not only may this intention be collected from the act itself, but the reason of the thing requires that the Directors should be protected by appeal in one case as well as in the other. The appeal is given, not to the Board of Control, but to the weaker party; and it will be strange if the weaker party is to refuse to accept its remedy in the one case, and to accept it only in the other. It has been argued that the course which the Board of Control ought to pursue is, to originate in this case a new dispatch, in the very terms of the amended dispatch; but this would be a most circuitous and clumsy expedient, and one of no good effect. The consequence would be a useless delay.

It is said that if the Board of Control originate, the Court of Directors will be relieved from responsibility. This new dispatch would, however, run in the name of the Directors, for they alone are known by the Presidencies of the East Indies; and it would be in exactly the same words as if it had originated with the Court of Directors themselves. Then, where is the difference of responsibility?

1833.

 The KING
 v.
 EAST INDIA
 COMPANY.

Origination of
 dispatch with
 Board of
 Control.

1833.

The KING
v.
EAST INDIA
COMPANY.

Political character of dispatch.

If their conduct should be questioned in Parliament, they would show their own dispatch as it originally stood, in the one case, and the orders and instructions of the Board of Control in the other.

If there be an appeal given by the act in this case, then the question as to whether the dispatch related to the civil or military government or the revenues of India, cannot be raised in this Court, but must be left for the decision of the Privy Council. If, on the other hand, this Court is of opinion that there is no power of appealing to the Privy Council, it is material to inquire into the fact whether this dispatch be or be not of a political nature; inasmuch as that, if it is considered to be of such a nature as to be liable to alterations by the Board of Control, the mandamus ought to issue. Can it be doubted whether this dispatch does relate to the government or revenues of India? Here is a negotiation between the East India Company and the sovereign Prince of an independent state. Can it be said that a negotiation between two governments is not an affair of state? It is true that as long as this was merely a suit in the Municipal Courts, it was a matter between individuals; but the moment the government of one country interposes by applying to the government of another country, to have justice done to a subject of the former, the negotiation respects the civil government of both. It is unnecessary to say that matters of this description, originating out of private debts between subjects of two nations, have often been the subject of long and intricate negotiations, which have finally terminated in war. By this dispatch it is directed that the agent at Hyderabad shall procure an arbitration to be entered into between the parties, and to obtain from the Nizam a guarantee for the execution of the award. This guarantee, being given by an independent foreign Prince, could only be given by way of treaty, and a breach of such a treaty might form the ground or reason of a war. The whole language of the draft makes it as one of a political nature; and though it is

now said by the Court of Directors that they considered the dispatch to relate merely to the administration of justice between party and party, it appears that the draft, as framed by themselves, was headed "Political Department," and thus they have themselves recorded a confession that the draft was political in its nature. If then this draft be political, the Board of Control had an undoubted right to alter and amend. They have done so, and have transmitted their amended dispatch to the Court of Directors, with orders to them to transmit to India. Supposing this to be an amended political dispatch, the language of the 12th and 13th sections is imperative as to immediate transmission by the Directors; and unless an appeal is given in this case by the 16th section, the former two sections are conclusive. The Directors then having refused to comply with the orders of the Board, this mandamus clearly must be to compel obedience.

1833.

 The KING
 v.
 EAST INDIA
 COMPANY.

With regard to the rescinding of the original order by the Directors, it may be added, that at the time of rescinding, the original order had changed its nature and character. The instrument then in existence and operation was an amended order; and with this they have not attempted to meddle. They may therefore be said to have rescinded an instrument which, in point of fact, had no existence, no effective operation, but had been superseded by another instrument, over which the Court of Directors could exercise no control.

Power of
rescinding.

Cur. adv. vult.

On a subsequent day in this term the judgment of the Court was delivered by

JUDGMENT.

LITTLEDALE, J.—The first objection to the issuing of the mandamus, made by the Court of Directors, is, that there does not appear to have been any refusal on their part to transmit the dispatch which is the object of the rule; but we are of opinion that from the discussion and correspondence that have taken place, though there may

Refusal to
transmit.

1833.

The KING
v.
EAST INDIA
COMPANY.

Power of
rescinding.

not have been a distinct refusal in so many words, there has been, particularly from the rescinding of the original resolution, such a refusal as is sufficient to authorize the Court to entertain the subject-matter of the mandamus.

The Court of Directors then object that they have rescinded the resolution of March, under which the dispatch was framed; and certainly if they could rescind that resolution, there would be an end to the dispatch altogether, and all alterations made by the Board of Control would fall to the ground with the dispatch, and no mandamus could issue. But we are of opinion that the Court of Directors had no authority to rescind their resolution of March. The act of parliament gives no such power, and we think that there is no implied power to be inferred. The dispatch, as originally framed, was sent to the Board of Control, and that Board has acted upon it, has made alterations, and returned it to the Court of Directors. Upon that a discussion has taken place between these two bodies of persons; and as the act of parliament has been so acted upon by the two bodies constituted for the purpose of considering any measures under the provisions of the act, we think it is not competent to the Court of Directors to annul the dispatch which they have originated; and more particularly as the latter part of the 15th section says, that the orders and instructions of the Board of Control in such a case are to be final and conclusive on the Directors. If that could be done, the Court of Directors might at any time annul a dispatch when they were not satisfied with the alterations of the Board of Control; and this might produce the greatest inconvenience in the administration of the affairs, which are now entrusted to two separate jurisdictions, each of which is to perform its own functions.

It is urged by the Directors that a mandamus ought not to be granted if there be another remedy; and that there is another remedy in this case, inasmuch as the Board of Control may, under the 15th section of the act, themselves originate a dispatch to answer all the purposes of the

altered dispatch, if the Directors do not frame and transmit one within fourteen days after request. But we are of opinion that such an objection to the mandamus cannot be supported. Here the measure has been begun and carried up to a certain point, which is capable of being enforced if the parties who apply for the mandamus are correct in their proceedings; and it is no answer to say that by some other proceeding, to be instituted by them, they may attain the same object. The Board of Control has a right to deal with the existing state of things. They are not bound to abandon that and resort to some other proceeding, merely because it may possibly in the end have the same effect.

Having disposed of these questions, the case now comes to this. The Directors originate a dispatch, which they now say does not relate to the government of India, but they head it "Political Department." This dispatch is transmitted to the Board of Control, who alter it in such a way as to make it a dispatch relating to the government. The Directors entered into discussions with the Board of Control; and in those discussions they do not object to the jurisdiction of the Commissioners, but their objections are to the merits of the alterations; and we think that, with relation to the present proceedings, they are bound by that admission, and having so treated it, cannot now retract.

We give no opinion whether the dispatch, if it had not been headed and afterwards treated as we have mentioned, really did relate to the government of India; nor whether this Court has jurisdiction to decide upon that question, if it should come before us in any other way; nor whether the Directors can in any other mode avail themselves of the opportunity of shewing that it did not: neither do we give any opinion whether the 16th section gives any appeal in case of an altered dispatch, as well as in a dispatch originating with the Board of Control: upon that right no such discussion has been raised as to affect the question

1833.
The King
v.
EAST INDIA
COMPANY.

Directors
stopped from
denying political
character
of dispatch.

Upon other
points, no
opinion.

1833.
 The KING
 v.
 EAST INDIA
 COMPANY.

whether a mandamus should go; neither has any application been made to enlarge this rule, to give an opportunity of appealing, as was done in the case of *The King v. The Court of Directors of the East India Company (a)*. Upon the whole of this case, we are of opinion that the rule for the mandamus should be made absolute.

Rule absolute.

Application to suspend issuing of mandamus, to give time to appeal, refused.

Spankie, Serjt., stated that no application to enlarge the rule was made on the part of the Directors, because it was thought unnecessary; and he prayed that the Court would suspend the issuing of the mandamus until the Directors should have had an opportunity of appealing, inasmuch as the question was one of considerable importance, and there was at least a doubt whether the Directors had or had not power to rescind their order; and but for that doubt they should have proceeded at once to his Majesty in Council, to determine whether this was a dispatch over which the Board of Control had no jurisdiction.

DENMAN, C. J.—I think, with a view to the practice of the Court, this application cannot be entertained (*b*). It must be the subject of a separate application. The Court have no doubt at all upon this subject, and therefore they have abstained from doing that which was done in the other (*c*) case.

(a) 4 Maule & Selw. 279.

(b) *Vide Hensworth v. Fowkes*, ante, 330.

(c) *The King v. The Directors of the East India Company*, 4 M. & S. 279.

1833.

BLOFELD v. PAYNE and another.

CASE. The declaration stated, that the plaintiff was the inventor of a certain metallic hone for giving an edge to razors &c., and was accustomed to wrap his hones up in a certain envelope containing directions for their use; that the plaintiff so wrapped up his hones in order to distinguish them from articles of the same description manufactured by other persons; and that the plaintiff enjoyed great reputation with the public, on account of the superior quality of his hones, and derived great gains from the sale thereof: Yet the defendant caused and procured to be made and sold a great quantity of hones, and caused them to be enclosed and wrapped up in a certain envelope greatly resembling in form, type, and size, the envelope of the plaintiff, and also wrapped up the said hones in a certain other envelope, denoting that the hones sold by the defendant were of the manufacture of the plaintiff: Whereby the plaintiff was prevented from selling and disposing of a great quantity of his hones; and whereby the hones of the plaintiff were greatly depreciated in value and injured in reputation, the said hones so sold by the defendants being greatly inferior to those manufactured by the plaintiff, Plea: general issue. The action was tried before *Deu-*
man, C. J. at the sittings after Michaelmas term. The learned judge left two questions to the jury. First, whether the plaintiff was the inventor or original manufacturer of a metallic hone; and, secondly, assuming the plaintiff to be such inventor, whether the article sold by the defendants was inferior in value to the hone manufactured by the plaintiff. The jury found that the plaintiff was the original inventor of the hone, but that the article manufactured by the defendant was not inferior in value to that sold by the plaintiff, and assessed the damages at one farthing. The learned judge directed a verdict to be entered for the

A., a manufacturer, uses the mark of *B.* for the purpose of giving to articles manufactured by *A.* the appearance of being of the manufacture of *B.* *B.* may maintain an action against *A.*, although *A.*'s articles are not inferior in quality to *B.*'s, and although it is not shewn that *B.* has sustained actual damage.

1833.

 BLOFELD
 v.
 PAYNE.

plaintiff for that amount, but gave the defendant leave to move to set aside the verdict and enter a nonsuit.

Barstow now moved accordingly. There were two material allegations in the declaration, first, that the plaintiff was the inventor of a certain metallic hone; and, secondly, that by the sale of similar hones the hones of the plaintiff were depreciated in value and injured in reputation. In order to entitle the plaintiff to a verdict, both these facts should have been found in favour of the plaintiff. The material question is, whether the plaintiff was injured by the conduct of the defendant.

LITLEDALE, J.—The verdict was quite right. It was properly left to the jury to say whether the plaintiff was the manufacturer or inventor of this hone. It is true that the jury found that the defendant's hone was not inferior to that of the plaintiff's, but by the fraudulent act of the defendant the plaintiff may possibly have been prevented from selling so many of his hones as he otherwise might have sold.

TAUNTON, J.—I am of the same opinion. The defendant did not enter into a fair competition with the plaintiff, but injured him by fraudulently imitating his wrapper; and this, I think, gives a right of action.

PATTESON, J.—It is quite clear that the defendant sold his article as if it had been that manufactured by the plaintiff; and thus the defendant may have prevented the plaintiff from selling so many as he otherwise would have sold, and may have diminished the value of the plaintiff's labour.

Rule refused (a).

(a) And see *Barker v. Green*, 2 Adol. 415; *Van Wart v. Woolly*, Bingham 317, 9 B. Moore, 584; 1 M. & M. 520; *Weller v. Baker*, *Marzetti v. Williams*, 1 Barn. & 2 Wils. 422.

1833.

WARDLE, Gent. one &c. v. NICHOLSON.

THIS was an action to recover the amount of an attorney's bill. At the trial of the cause at the Appleby spring assizes in 1832, the following facts appeared. The goods of one *Barrow* were distrained upon for rent. The defendant, a creditor of *Barrow*, requested the plaintiff to prepare an assignment to himself as trustee of all the defendant's effects, for the benefit of his creditors. The assignment was prepared and executed. At this time *Barrow's* goods had not been sold, and the plaintiff being of opinion that no rent was actually due, advised the defendant to replevy. The goods were accordingly replevied, and the plaintiff paid the deputy-sheriff for preparing the bond. The goods remained in the possession of the defendant for three weeks, during which time they were advertised for sale; and the plaintiff paid for the printing and posting of the hand-bills and advertising the sale. *Barrow* became bankrupt before a sale had been effected, and the messenger under the commission took possession of the goods. The bill, for the recovery of which the action was brought, after eleven items relating to the preparing of the assignment, contained the following charges :

Held, that an attorney's bill for business done in the County Court is taxable.

The preparing of a replevin bond is business done in the County Court.

August, 1830. The landlord having distrained illegally, at- £. s. d.
teading you and Mr. Graham, when it was agreed upon to

replevy the goods, and attending for notice of distress . . .	0	6	8
Attending Mr. Hecles, and giving instructions . . .	0	3	4
Attesting bond . . .	0	6	8
Paid Mr. Hecles' charges . . .	2	2	0
Attending to deliver discharge to officer in possession . . .	0	3	4
Paid his fees . . .	0	7	6
Instructions for notice of sale . . .	0	3	4
Drawing a fair copy advertisement . . .	0	5	0
Attending printer therewith, and afterwards to correct press . . .	0	3	4
Paid for printing and posting . . .	2	0	0
Attending and advising you several times as to his, Mr. Bar-			
row's, being made a bankrupt . . .	0	13	4
Attending at the house, at your request, when a messenger en-			
tered under the warrant of seizure . . .	0	6	8

1833.

WARDLE
v.

NICHOLSON.

It was objected at the trial, on the part of the defendant, that the bill contained taxable items, and that as it had not been delivered a month before the commencement of the action, the plaintiff was not entitled to recover. The jury found a verdict for the plaintiff; and leave was given to the defendant to move to enter a nonsuit. *Blackburne* accordingly obtained a rule nisi, against which

Whether entering into a replevin bond is a proceeding in a Court.

Courtney now shewed cause. There are in this bill no taxable items. The entering into a replevin bond is not business done in any Court whatever; it is a mere preliminary step, which may or may not, in the discretion of the party replevying, form the foundation of an action. There are only two ways in which an action of replevin can be commenced; by plaint in the County Court, or by writ out of Chancery (a). In this case there has been no plaint entered, or writ issued; therefore the business done was not connected with any Court. The case of *Burton v. Chatterton* (b) is in principle extremely similar to this. There it was held that charges for drawing an affidavit of debt and bond to the Chancellor, in order to obtain a commission of bankrupt, the affidavit not having been sworn nor the commission issued, were not taxable within the meaning of the statute of 2 Geo. 2, cap. 23, section 23.

Whether business done in County Court, taxable.

Assuming however that the entering into this bond is a proceeding in a Court, still the County Court is not a Court of Record; to which Courts alone the Act extends (c). The 23d section, which requires the delivery of the bill of costs one month before the bringing of any action for fees, &c., and which requires the judge of the Court to refer the bill to the proper officer for taxation, if an application is made by the parties, or any person authorized in that behalf, speaks of "the Courts aforesaid," and thus makes it necessary to look at the enumeration in the first section of the Act. That section enacts that no one shall be permitted to act as

(a) 2 Inst. 139, 140. (b) 3 B. & A. 486. (c) *Post*, 359 (a).

an attorney in his majesty's Court of King's Bench, Common Bench, or Exchequer, or Duchy of Lancaster, or in any of his majesty's Courts of Great Sessions in Wales, or in any of the Courts of the Counties Palatine of Chester, Lancaster and Durham, or in *any other Court of Record* in England, unless he shall have been sworn, admitted and inrolled, as therein directed (a). If this act,

(a) The three sections of the act which bear upon the question before the Court, appear to be the first, the third, and the twenty-third.

The first section enacts, "That no person shall be permitted to act as an attorney, or to sue out any writ or process, or to commence, carry on, or defend any action or actions, or any other proceedings, either before or after judgment obtained, in the name or names of any person or persons, in His Majesty Court of King's Bench, Common Pleas, or Exchequer, or Duchy of Lancaster, or in any of His Majesty's Courts of Great Sessions in Wales, or in any of the Courts of the Counties Palatine of Lancaster, Chester, and Durham, or in any other Court of Record in that part of Great Britain called England, wherein attorneys have been accustomedly admitted and sworn; unless such person shall take the oath hereinafter directed and appointed to be taken by attorneys, and shall also be admitted and inrolled in the said respective Courts, in such manner as is hereinafter directed."

The third section enacts, "That no person shall be permitted to act as a solicitor, or to sue out any writ or process, or to commence, carry on, or solicit or defend any suit, or any proceedings, in the

name of any other person, in any Court of Equity, either in his Majesty's High Court of Chancery, Court of Equity in the Exchequer Chamber, Court of the Duchy Chamber of Lancaster, at Westminster, or Courts of the Counties Palatine of Lancaster, Chester, or Durham, or of the Great Sessions in Wales, or in any inferior Court of Equity in that part of Great Britain called England, unless such person shall take the oath hereinafter directed and appointed to be taken by solicitors in Courts of Equity, and shall also be admitted and inrolled in such of the Courts of Equity where he shall act as a solicitor, or shall be sworn, admitted, and inrolled, in such manner as is hereinafter directed."

The twenty-third section enacts, "That no attorney or solicitor of any of the Courts aforesaid shall commence or maintain an action or suit, for the recovery of any fees, charges, or disbursements, at law or in equity, until the expiration of one month or more after such attorney or solicitor respectively shall have delivered unto the party or parties to be charged therewith, or left for him, her, or them, at his, her, or their dwelling-house, or last place of abode, a bill of such fees, charges, and disbursements, written in a common legible hand, and in the English tongue,

1835.

WARDLE
v.
NICHOLSON.

1833.

WARDLE

v.

NICHOLSON.

therefore, does not apply to any but Courts of Record, and if this be not a Court of Record, it is not requisite to have

except law terms, and names of writs, and in words at length, except times and sums; which bill shall be subscribed with the proper hand of such attorney or solicitor respectively. And upon application of the party chargeable unto the Lord Chancellor, or the Master of the Rolls, or unto any of the Courts aforesaid, or unto a judge or baron of any of the said Courts respectively in which the business contained in such bill, or the greatest part thereof, in amount or value, shall have been transacted, and upon the submission of the party to pay the whole sum that, upon taxation, shall appear to be due, (vide *Watson v. Postan*, 2 Crompt. & Jerv. 370,) it shall be lawful for the Lord Chancellor, the Master of the Rolls, or any of the Courts aforesaid, or any judge or baron of any of the said Courts respectively, and they are hereby required to refer the said bill, and the attorney's or solicitor's demand thereupon (although no action or suit be pending in such Court touching the same) to be taxed by the proper officer of such Court," &c.

Thus the first section of 2 Geo. 2, c. 23, requires the admission of attorneys in Courts of Law; the third provides for the admission of solicitors in Courts of Equity; the 23d restricts attorneys and solicitors practising in any of the Courts aforesaid, from bringing actions without having delivered a bill signed, and authorizes the client to apply to the Chancellor or Master of the Rolls, or to a judge or baron of the Court in which the

greatest part of the bill in amount or value has been incurred, to refer the bill for taxation. Looking no further than 2 Geo. 2, c. 23, a bill for business in the County Court would appear not to be taxable. The words of reference in the 23d section would be satisfied by the Courts of Law mentioned in the first section, and the Courts of Equity mentioned in the third section. The relative position of "the Lord Chancellor or the Master of the Rolls," and "a judge or baron," affords some ground for presuming that the legislature contemplated the respective judges of Courts possessed of nearly equal dignity and jurisdiction; and it is difficult to suppose that under the description of "judges and barons," the legislature meant to include the Chief Justice of England, and also every helper in his stable who happening to be tenant by the curtesy of a 40s. freehold, might be one of the judges of the County Court, and to direct that the power of referring the attorney's bill for taxation should vest in the master or in the servant, according as the business done in the Court of King's Bench or in the County Court should be the larger in amount.

The 12 Geo. 2, c. 13, s. 7, prohibits persons from practising in the County Court who are not legally admitted as attorneys according to the 2 Geo. 2, c. 23, under a penalty of 20*l*. It does not, however, in express words apply the other provisions of the former statute to the County Court. The provision in 22 Geo. 2, c. 46, s. 12, (post, 361 (c),) extending this pro-

delivered the bill one month before an action is commenced for business done therein as an attorney, and the bill, if delivered, would not be taxable (a). It seems unnecessary to quote authorities to prove that the County Court is not a Court of Record. This indeed is sufficiently shewn by the terms of the writ of *recordari facias loquelam*, by which the plaint is removed into the superior Court.

If the Court should think that the business done by the plaintiff is something done in the course of a cause, and should consider the items on that ground taxable, there is still this objection, that the party could not get his bill taxed, because there is no proper officer of the County Court to whom the bill can be referred for taxation. The freeholders could not do this. [*Littledale*, J. referred to the case of *Raynal v. Smith* (b).] That case is very different from the present, because there the action was by an attorney against an attorney.

A distinction has been acted upon between the cases where no bill has been delivered, and where a bill has been delivered which is faulty under the statute. Here, there was no bill of costs, but only a bill of particulars. Although the Court should think that there are in this *bill of particulars* some items which ought to be taxed, yet if there be any

hibition to Courts of Quarter Sessions, is in nearly the same terms as that in 12 Geo. 2, relating to County Courts. In the cases of *Ex parte Williams*, and *Clarke v. Donovan*, (post, 362,) in which the Courts decided that an attorney's bill for business done in Courts of Quarter Sessions might be referred to the master for taxation, pursuant to 2 Geo. 2, c. 23, s. 23, no allusion whatever appears to have been made to the act of 22 Geo. 2; from which it may, perhaps, not unfairly be assumed, that the Courts considered the provisions of that statute not to throw any light upon the question before

them. In both the above cases the Court was guided entirely by a consideration of the *practice*.

(a) From the language of 22 Geo. 2, c. 46, s. 12, an inference may, perhaps, be raised, that when that statute was passed the legislature contemplated the 2 Geo. 2, c. 23, as extending only to Courts of Record. Though the expression in 22 Geo. 2, c. 46, s. 12, is 'Courts of Record at Westminster,' it is to be observed that the Courts of Record at Westminster are the only Courts of Record of general jurisdiction mentioned in 2 Geo. 2, c. 23.

(b) 2 Barn. & Adol. 469.

1833.
WARDLE
v.
NICHOLSON.

No taxing
officer in
County Court.

Severance of
items in bill.

1833.

WARDLE
v.

NICHOLSON.

that are not so, the plaintiff may recover in respect of them. Whatever opinion the Court may entertain concerning the other charges, the sum paid for posting handbills is not an item which they will consider taxable. In the cases of *Lloyd v. Read* (a), and *Miller v. Towers* (b), cited and supported by Lord Eldon in *Hill v. Humphreys* (c), this distinction was taken. In the former of these cases, the solicitor to a commission of bankrupt was permitted to recover £7 10s. paid to the messenger without having delivered his bill, because the money was not expended as an attorney. In the other case, the plaintiff was allowed to recover for conveyancing business, although precluded from recovering the rest of his demand, because he had omitted to deliver his bill. So also in *Mowbray v. Fleming* (d). *Winter v. Payne* (e) may be relied on upon the other side; but that case was decided in 1796, before *Hill v. Humphreys*, in which Lord Eldon reviews the cases upon this subject. Neither does it appear whether or not any bill had been delivered in *Mowbray v. Fleming*. The only principle which has been laid down favorable to the defendant in this case is, that an attorney shall not sever his demand, although no bill had been delivered by him before action brought. But in the case of *Banton v. Garcia* (f), in which that is laid down, the whole demand was connected with the plaintiff's character of an attorney.

Severance.

Blackburne, in support of the rule.—It is admitted that the distinction taken in *Mowbray v. Fleming* is correct. Where money is paid by a man in his character of an attorney, it must be taxed; but where not paid in that character, it may be recovered without taxation. In the bill at present under the consideration of the Court, no item was charged which was not paid in the character of attorney for the party. *Winter v. Payne* shews that this is the right distinction.

(a) Cor. Buller, J. Easter, 1787.

(d) 11 East, 285.

(b) Penke's N. P. C. 102.

(e) 6 T. R. 645.

(c) 2 Bos. & Pull. 343.

(f) 3 Esp. N. P. C. 149.

The case of *Smith v. Taylor* (a) appears to be the last decision upon the subject. There, though a difference of opinion arose upon the question whether certain items were taxable or not, all the judges agreed in thinking that where a bill contains one taxable item, the whole bill ought to be delivered according to the provision in 2 Geo. 2, c. 23.

It is not necessary that the business done should be in a Court of record. The first clause of the act, after enumerating several of the chief Courts of record &c., continues, "and in any other Courts of record in that part of Great Britain called England *wherein attorneys have been accustomedly admitted and sworn.*" This only goes to shew to what Courts of record attorneys must be regularly admitted: it does not even extend to Courts of equity, wherein costs are undoubtedly taxed. In the 23d clause it is said, "no attorney or solicitor of any of the Courts aforesaid shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements at law or in equity (b)." It cannot be meant by this to refer to the enumeration in the first clause. It was at first doubted whether the act extended to the case of business done at a Court of Quarter Sessions (c), which for many purposes is not a Court of record (d); but the Courts afterwards decided

1833.

WARDLE
v.
NICHOLSON.

Business done
in what
Courts, tax-
able.

(a) 7 Bingham 259, 5 Moore and Payne, 66.

(b) But see the third section ante, 257 (a).

(c) By 23 Geo. 2, c. 46, s. 12, it is enacted, that no person shall act as solicitor, attorney, or agent, at any general or quarter sessions of the peace, either with respect to matters criminal or civil, "unless such person shall have been heretofore admitted an attorney of one of his Majesty's Courts of Record at Westminster, and duly inrolled, pursuant to an act made in the 2d

year of his present Majesty's reign, intituled, 'An Act for the better Regulation of Attorneys and Solicitors,' (2 Geo. 2, c. 23,) or unless such person shall hereafter be admitted an attorney and inrolled as aforesaid by virtue of this act, or such other act as shall be then in being; and unless such person shall continue so entered upon the roll at the time of such his acting in the capacity aforesaid." Penalty 50*l*.

(d) As where that Court acts not judicially but ministerially; as in inrolling orders, &c.

1833.

WARDLE
v.

NICHOLSON.

that an attorney's bill for such business was taxable; *Ex parte Williams* (a), *Clarke v. Donovan* (b). In the latter case Lord *Kenyon* said, that it was found to be the practice of the Court to tax bills for business done entirely at the sessions; and this is an answer to the argument now used, that the bill cannot be taxed, because there is no officer in the County Court itself to whom the bill can be referred. It was said by Lord *Eldon*, Chancellor, in *Balme v. Paver* (c), that "nothing ought to be guarded with so much jealousy as the right of suitors to have their bills of costs taxed." In *Smith v. Taylor, Tindal*, C. J. says, "it is always difficult, when we come to extreme cases, to say whether they are within the rule or not; but seeing that the act is remedial, it is better to draw in a case on the extreme verge than to leave it without." There is as much reason for taxing bills for business done in County Courts as any others. The suitors (d) cannot know the value of the services of their attorneys; and therefore to prevent extortion, the bill of the attorney is required in one case, as well as in another, to be referred to a competent judge. The replevin bond is the first step in the suit; or at least it is as much connected with the suit as many matters, charges respecting which the Courts have held to be taxable items. In *Winter v. Payne*, the charge was for drawing and ingrossing affidavit to hold to bail. In *Sandom v. Bourn* (e), the charge was for preparing a warrant of attorney. In *Weld v. Crawford* (f), it was held, that preparing a warrant of attorney was a taxable item, although no warrant was ever executed. It must be admitted that the distinction taken in *Burton v. Chatterton* seems much to interfere with the decision in *Wilde v. Crawford*. In *Ex parte Pricket* a charge for a *dedimus potestatem* was held to be

(a) 4 T. R. 124, 496.

(b) 5 T. R. 694.

(c) 1 Jacob, 307.

(d) By "suitors" must here be

understood the "suitor-parties,"
not the "suitor-judges."

(e) 4 Campb. 68.

(f) 2 Starkie, N. P. C. 538.

a taxable item. *Watt v. Collins* (a), *Smith v. Taylor* (b). In the case of *Ex parte Flint* (c), decided upon the 12 Geo. 2, c. 13, s. 9, the language of which is nearly the same as that of 2 Geo. 2, c. 23, s. 23, it was held that an attorney under imprisonment is within the prohibition of that statute, and is liable to be struck off the roll for practising during such imprisonment, by entering a plaint in the County Court, and issuing process thereon; and yet that is a highly penal statute.

1833.
WARDLE
v.
NICHOLSON.

LITLEDAL, J.—I think this rule ought to be made absolute. The statute of 22 Geo. 2, c. 23, s. 1, directs that no person shall be permitted to act as an attorney in the Courts of King's Bench, Common Pleas, Exchequer, and other Courts of record wherein attorneys have been accustomedly admitted and sworn, unless he shall have been sworn, admitted and inrolled in the said respective Courts. Therefore the liberty to practice in those Courts is confined to persons who have been regularly admitted. But the 23d section says, "no attorney or solicitor of any of the Courts aforesaid shall commence any action or suit for the recovery of any fees, charges, or disbursements at law or in equity, until" &c. This clause in respect to business done, is not confined to the same Courts, but extends generally to all business, either at law or in equity; and it has been determined that Courts of Quarter Sessions (d) fall within its provisions. Then the question is, whether business done in County Courts is within the act. My brother *Patteson* has referred me to the 12 Geo. 2, c. 13, the 7th section of which requires, that no person shall act as an attorney in the County Courts of England unless he shall have been legally admitted as an attorney or solicitor according to the act of 2 Geo. 2, c. 23. Coupling the two statutes together I must say that a County Court is a Court requiring both admission and taxation.

Business done
in what
Courts, tax-
able.

(a) *Ryan & Moody*, 284.

(c) 2 Dowl. & Ry. 406; 1 Barn.

(b) 7 Bingh. 259, 5 Moore and
Payne, 66.

& Cressw. 254.

(d) *Vide ante*, 359, n.

1833.

WARDLE

v.

NICHOLSON.

Taxable items.

Course of proceedings in replevin.

Severance of items.

Then, has in this case any thing been done in the County Court which is taxable? It seems to me that many of the items are so. "The landlord having distrained illegally, attending you and advising you to replevy." "Attending for notice of distress." "Attending *Hecles* and giving instructions," that is, to enter a plaint. "Attending, and attesting bond." The statute of Westminster directs, that before the goods are delivered a plaint shall be entered; it is therefore quite clear that a plaint has been entered in this cause, because the next charge is, "Attending at the delivery of the goods," which would not have been delivered if no replevin suit had been commenced; so that a suit was clearly pending in the County Court. This being so, I have no doubt that these are charges requiring a delivery of the bill.

But it is said that as no bill was delivered, the plaintiff can recover in respect to the items which do not relate to his character of attorney, and which are not themselves taxable; and several cases were cited. I take the distinction to be this; that where it appears on the demand that some charges are taxable and some not, the whole bill should be delivered; and if it had been delivered all would have been taxable; for the taxable items would have drawn to them those which are not so; but when there are matters in a bill clearly having no relation to business as attorney, as if the attorney had lent a sum of money, or was a banker, and had advanced money for the defendant, the master, upon reference to him, would not tax those items at all, unless requested to do so by both parties for the purpose of taking the account; he would strike them out altogether, and then proceed to tax the rest. If I could see in this bill any items wholly distinct from the plaintiff's character of attorney, I should consider that the plaintiff would be entitled to recover. Paying for posting up hand-bills it is contended is of that description; but I do not think it can be considered as wholly unconnected with the professional character of the plaintiff; it is, I think, the same as if he

had paid so much for a stamp. The whole bill may be divided into charges for business done in the County Court, and to charges for other professional business. It appears to me therefore that the rule should be made absolute.

1833.
WARDLE
v.
NICHOLSON.

TAUNTON, J.—I am also of opinion that the rule should be made absolute. The act in question is not confined to the Courts mentioned in the first clause. I entertained a doubt at one period whether the items were charges and disbursements in any Court of law or equity; but we must bear in mind the order of proceeding by which a party distrained upon recovers the possession of the goods. The first step, as I apprehend, is to levy the plaint; and then the sheriff takes the bond. Upon reference to Mr. Tidd's Practical Forms, I find that he states the proceedings in the order I have mentioned; and I perceive that the language used in the condition of the replevin bond strongly imports that a suit has been actually commenced prior to the execution of the bond. If this be so, the payment to the county clerk, the attendances mentioned in the bill &c. are all matters appertaining to a suit. The ground on which the item was considered taxable in one of the cases cited of the bail bond applies here, and indeed with greater force. So also; with regard to the case in which the charge was for drawing and ingrossing affidavit of debt &c. This was a proceeding *at law* which brings it within the words of the statute. Taxable items.

It has been objected, that the words of the statute are confined to the superior Courts of record; but that is not so; for it has been decided that business done in the Courts of Quarter Sessions and of Insolvent Debtors is within the act. Business done in what Courts, taxable. The case of *Reynal v. Smith* was upon the statute of Jac. 1. and was decided upon the particular words of that act, which confine its operation to the Courts of record at Westminster. But the language of 22 Geo. 2 is much more general, when it speaks of fees for business done at law or in equity, without referring to particular Courts. In the case of *Burton v. Chatterton* the charge for prepar-

1833.

WARDLE

v.

NICHOLSON.

ing affidavit of petitioning creditor's debt and bond to the Chancellor in order to obtain a commission of bankruptcy, was held not to be charge at law or in equity; but then the affidavit was never sworn, no docket was struck, and no commission issued, and thus there was no proceeding at law or in equity.

Severance of
items.

With regard to the distinction taken in *Mowbray v. Fleming*, all that was decided in that case was, as it appears to me, that where a bill of particulars only is delivered, an attorney is entitled to recover for money paid for his client's use, having no reference to his business of an attorney. But here the items are none of them of that nature; and therefore this case does not come within the distinction.

Whether tak-
ing replevin
bond is a pro-
ceeding in a
suit.

PATTESON, J.—I am also of opinion that the rule ought to be made absolute. Two questions arise in this case. First, whether the taking of the replevin bond is a proceeding in a suit. I had at first considerable doubts, but upon the looking at the course of proceedings in replevin, I no longer entertain any doubt upon this point. At common law replevin could only be by writ; but by the statute of *Marlbridge (a)*, the sheriff is empowered to hold plea in replevin upon plaint by the party, which plaint may be made out of Court. The next statute, that of 13 *Edw. 1*, empowers the sheriff to take pledges from the complainants, not only to prosecute the suit with effect, but also to return the goods in case a return shall be adjudged; which pledges, it was very early considered, might be by the bond of the plaintiff in replevin himself. Having taken pledges (for the insufficiency of which he is answerable) *(b)* the sheriff ought immediately to make a deliverance of the distress. It is the statute of 1 & 2 *Philip & Mary (c)* which directs the sheriff to appoint deputies authorized to make replevies and deliverance of distresses in the sheriff's name, and in such manner as the sheriff may and ought to do. The statute

(a) 52 H. 3, c. 21.

Taunt. 225, 1 Marsh. 27.

(b) *Vide Hindle v. Blades*, 5

(c) Cap. 12.

now in force, and which applies to the present case, is the 11 Geo. 2, c. 19, section 25 of which provides, that sheriffs and other officers, having authority to grant replevins, shall in every replevin of a distress for rent, take in their own names from the plaintiff and two sureties, a bond in double the value of the goods distrained, and conditioned for prosecuting the suit with effect and without delay, and for returning the goods in case a return shall be awarded before any deliverance be made of the distress. This bond being taken by the sheriff or other officer, he is bound forthwith to make deliverance to the party replevying. That act does not authorize the sheriff to alter the course of proceeding and take a bond where no plaint has been levied. The bond is conditioned to *prosecute the suit*, which must therefore have a prior existence. If the bond might be taken before a plaint has been levied, it would follow that the goods might be replevied without a plaint; for the deliverance of the distress is directed to take place immediately on the execution of the bond. I am now, therefore, clearly of opinion that the business done was in a proceeding in the County Court.

The second question then, is, whether the 2 Geo. 2, c. 23, applies to business done in County Courts. The decision referred to on the statute of Jac. 1, turns on the precise words of that act. It appears to me that the legislature did not mean to restrict the section relative to taxation of attorneys' bills, by the section requiring the admission. If an attorney could act in a County Court without being an attorney of a Court of record, an argument might be raised in favour of the present plaintiff, though I do not say the argument would be good; but that is entirely taken away by the 12 Geo. 3, c. 13.

A third point was raised upon the distinction between the cases where a bill of costs, and where a bill of particulars only, has been delivered, as to whether certain charges are referable to the plaintiff's character as attorney. Upon this I perfectly agree with my brother *Taunton*, that you must


1833.

WARDLE
v.

NICHOLSON.

Whether business done in County Court, taxable.

Severance of items in an attorney's bill.

1833.

 WARDLE
 v.
 NICHOLSON.

shew most clearly that the items are entirely unconnected with the professional character of the attorney or solicitor. The items which have been relied on in this case I do not consider to be so unconnected; and therefore I think that a nonsuit should be entered.

Rule absolute (a).

(a) And see *Dann, ex parte*, 9 2 Barn. & Adol. 413; *Crowder v. Ves.* 547; *Wilson v. Gutteridge*, *Davies*, 3 Younge & Jerv. 433; 4 Dowl. & Ryl. 736, 3 Barn. & *Jones v. Byewater*, 2 Crompt. & Cressw. 157; *Dagley v. Kentish*, Jerv. 371.

The KING v. The JUSTICES of CARMARTHEN.

An order of removal made from the parish of A. to the parish of B. (in which are two townships, C. and D., each having separate overseers and maintaining its own poor), is served upon the overseers of C., to whom the paupers are delivered. An appeal against this order is entered and respited as the appeal of the churchwardens and overseers of B. A notice of trial for the subsequent sessions, given in the name of the overseers of the township of C. as appellants against an order made upon the overseers of the township of C., in the parish of B., is sufficient.

A Rule had been obtained, calling upon the justices of Carmarthen and the parish officers of Mothvey, in that county, to shew cause why a mandamus should not issue to the justices, commanding them to enter continuances to hear an appeal of the Inhabitants of the hamlet of Tregenmaur, in the parish of Llywell, in the county of Brecon, against an order of removal, by which *June Jones* and her four children were removed from Mothvey to Tregenmaur. From the affidavits filed it appeared that the order had been obtained at the instance of the churchwardens and overseers of Mothvey, and was addressed to them and to the churchwardens and overseers of the parish of Llywell, in which parish the settlement was adjudged to be. The parish of Llywell is divided into three hamlets, Tregenmaur, Tryinglaes and Sclydach, each of which supports its own poor, has separate overseers, and makes separate rates for the relief of the poor. There are no overseers of the parish of Llywell at large; and the sessions for the county of Brecon have entertained appeals against orders of removal between the different hamlets in the parish. The overseer of Mothvey removed the paupers to

the hamlet of Tregenmaur, and delivered the order of removal to the overseers of that hamlet. At the sessions subsequent to the order, an appeal against it was entered and respited, as the appeal of the churchwardens and overseers of the parish of Llywell. Previously to the next sessions, a notice of intention to try the appeal was served in the name of the overseers of the hamlet of Tregenmaur. This notice described the order as an order addressed to the parish officers of the hamlet of Tregenmaur, in the parish of Llywell, and described the appeal then pending as an appeal against that order. At the sessions, when the appeal was called on for trial, the respondents objected that there had been no sufficient notice of trial of the appeal, as the notice served did not apply to the order which had been made or the appeal which had been entered. The Court, being of this opinion, refused to hear the appeal.

1833.

 The KING
 v.
 CARMARTHEN.

Whitcomb now shewed cause. The parish of Llywell was bound to give notice of appeal. In *Spitalfields v. Bromley (a)*, it was held that a hamlet maintaining its own poor is to be considered as a separate parish, and that if a person whose settlement is in a hamlet within a parish, be removed to the parish at large, the parish ought to appeal, and may shew that the settlement is in the hamlet. The parish of Llywell therefore should have appealed, and might have shewn that the settlement of the paupers was in the hamlet of Tregenmaur and not in the parish of Llywell: *The King v. Kirkby Stephen (b)*. The jurisdiction of the sessions arises from the lodging of the appeal. That court has no original jurisdiction over an order of removal. The statute of 9 Geo. 1, c. 7, (c) directs that the sessions shall not hear any appeal unless reasonable notice has been given, by the overseers of the parish making the appeal, to the overseers of the parish from which the pauper has

(a) 18 Vin. Abr. 468; 2 Bott's P. L. 684.

(b) Burr. S. C. 664; 2 Bott, 617.

(c) Sect. 4.

1833.


 The KING
 v.
 CARMARTHEN.

been removed. The Court of Quarter Sessions could not hear the appeal as between the two parishes, because there was no notice of trial from the appellant parish to the parish from which the paupers were removed; nor could they hear an appeal as between the hamlet and the parish of Mothvey, because in fact no such appeal had been entered. The case of *The King v. Amhuch (a)*, which may be cited on the other side, differs from the present case, because there the parish and vill bore the same name, and the language of the notice might apply to either.

Campbell, S.G. and E. V. Williams, contra. An order of removal having been delivered to the township with the paupers, the township was bound either to obey the order or to appeal against it. They could not return the paupers to the removing parish, because as between them the order was conclusive. The township alone was interested, and was aggrieved by the order of removal. The township therefore was bound to appeal; for, by 13 & 14 Car. 2, c. 12, s. 2, "all such persons who think themselves aggrieved by any such judgment of the said two justices, may appeal to the justices of the peace of the said county at their next quarter sessions, who are hereby required to do them justice according to the merits of their cause." The township did appeal, describing the appeal so that it should appear to follow the order. The notice required by the 9th Geo. 1 is a notice by the party who makes the appeal, and that notice has been given. The object of requiring this notice was that the removing parish might have an opportunity of supporting the order, which object was gained by the notice served in the present case.

By the COURT.—The parish of Mothvey could not be misled by the notice of appeal. The notice described the order of removal by the names of the paupers, the name of the parish from which the paupers were removed, and of that part of the parish of Llywell to which the removal

(a) 6 Dowl. & Ry. 626; 4 Barn. & Cressw. 757.

was in fact made. This description is sufficient. The removing parish served the order upon the hamlet of Tregenmaur, although the order spoke of the parish at large; and by their own act they are estopped from taking this objection either to the appeal or to the notice of appeal.

1833.
The KING
v.
CARMARTHEN.

Rule absolute (a).

(a) And see *Rex v. Harrow on the Hill*, 2 Bott's P. L. 714.

SMITH v. GOODWIN and RICHARDS.

CASE for an irregular distress. At the trial before *Denman*, C.J. at the sittings for Middlesex after Michaelmas term last, it appeared that the plaintiff was tenant to the defendant *Goodwin*, at the yearly rent of 25*l*. At Midsummer 1831, when one half-year's rent became due, the plaintiff, who had done some work for *Goodwin*, offered to pay him the balance of the half-year's rent, deducting his account. This *Goodwin* refused to accept, and on the 31st August the defendant *Richards*, at the request of *Goodwin*, levied a distress upon the premises. On the 2d September the plaintiff tendered to *Goodwin* twelve sovereigns and a half for the rent, and 13*s*. for the expenses. *Goodwin* refused to accept this money, saying that he had left the matter in the hands of *Richards* the broker, and that plaintiff must settle with him. On the following day the plaintiff tendered to *Nash*, the man in possession, 13*l*. 9*s*. for the rent and expenses, at the same time demanding a receipt, which *Nash* being unable to give, the money was not paid. *Nash* went for a receipt, and upon his return said *Richards* was out, and that *Goodwin* desired him not to take the money. *Nash* then abandoned the possession, and *Richards*, on the 7th September, at the

Tender of rent and expenses need not be made to the broker who distrains; if made to the landlord a subsequent detainer is wrongful.

1833.

SMITH
v.
GOODWIN.

command of *Goodwin*, re-entered. In order to prevent his goods from being sold, the plaintiff paid the money under protest, and in respect of this second distress brought the present action. The learned judge told the jury that he thought the tender to *Goodwin* of the rent and expenses was a good tender, and that the plaintiff was entitled to recover. The jury found a verdict for the plaintiff, damages 10*l*.

Coltman now moved for a new trial. *Goodwin* was warranted in refusing to receive the money tendered. Where a party has employed a broker to make a distress, the broker is the person to whom the tender ought to be made, for the landlord cannot know what is the amount of the charges. The broker had an interest in part of the money which was tendered, and therefore *Goodwin*, without *Richards's* authority, could not accept the tender as to his part. This distress was within the act of 57 *Geo.* 3, c. 93. In every part of that statute the broker is the person contemplated as acting throughout the whole transaction, and the statute was passed for the express purpose of remedying abuses committed by the brokers. By the 2d section it is provided, that upon complaint by the party aggrieved to a justice of the peace, if it shall appear to him that the person or persons complained of shall have levied, taken, received, or had other and greater costs and charges than are mentioned or fixed in the schedule to the act, or made any charge for any act not done, such justice shall order treble damages and full costs to be paid by the person so having acted, to the party having preferred his complaint. How can the landlord know whether the charges are more than they should be? And yet if he had taken greater charges than are warranted by the act, he would have been liable to the penalty; although from the 4th section it clearly appears that the act did not intend that the landlord should be put to the peril of having to pay treble damages

when he employs a broker. *Goodwin* was entitled to throw upon the broker the burthen of determining the amount of the charges, and therefore he was right in refusing personally to accept the tender which was made to him. [*Patteson*, J. If the tenant himself tendered too large a sum, he could not afterwards go before a justice and say that the broker had received too much; and therefore in cases in which there is a tender the danger spoken of cannot arise.] The act says, "levied, taken, *received* or had other and greater charges than are mentioned in the schedule." Therefore if more had been tendered to the broker than he was entitled to receive, it was his duty to state that fact. It was intended by the act to give a full and complete protection to the tenant.

1833.
SMITH
v.
GOODWIN.

By the COURT.—It is clear that the tender to the landlord was a good tender. The case of *Moffat v. Parsons* (a) is an authority in support of this opinion. The tenant need not go to the landlord to know what is the amount of the charges. He may learn that from the broker, and then tender the whole to the landlord or to the broker. The tender to *Nash* was rendered invalid, by the refusal to pay unless a receipt (b) were given.

Rule refused (c).

(a) 5 Taunton, 307. In that case the tender was made to the plaintiff's clerk who was in the habit of receiving moneys for his master, but who on this occasion was ordered by his master not to receive the money when it should be tendered, as he had put the matter into the hands of his attorney.

When a quarter's rent is tendered and refused, and another quarter accrues and is tendered, this appears to be sufficient, without tendering the whole rent then

due: *Basset v. Prior of St. John of Jerusalem in England*, M. 2 H. 6, fo. 4, pl. 1, per *Martin*, J.; Fitz. Abr. 1 R. 3, *Verdict*, pl. 13; 20 Vin. Abr. 182, pl. 2.

(b) See *Glasgow v. Day*, 5 Esp. N.P.C. 48; *Huxham v. Smith*, 2 Campb. 21; *Dent v. Dunn*, 3 Campb. 296; *Evans v. Judkins*, 4 Campb. 156; *Free v. Kingston*, *ibid*.

(c) A rule nisi for arresting judgment was granted upon another point. *Vide post*, T. T.

Separate tenders of two quarters' rent.

1833.

COLEBROOKE, Bart. and others, v. LAYTON, Clerk.

A warrant of attorney, the defeazance to which recites that it is given to secure the payment of an annuity, and authorizes the plaintiff to issue a *fi. fa. de bonis ecclesiasticis*, for arrears, but does not state that it is given for the purpose of charging the defendant's ecclesiastical living, is valid, though it refers to the annuity deed of the same date, in which that object is distinctly avowed.

A rule to set aside a warrant of attorney, as given upon an illegal consideration, is in the nature of an application to set aside proceedings for irregularity, so as to entitle the party successfully resisting it to the costs of the application.

THESIGER had obtained a rule nisi on behalf of the defendant, calling upon the plaintiffs, who were the trustees of the United Empire and Continental Life Assurance Association in London, to shew cause why a warrant of attorney and judgment entered thereon, and sequestration issued on such judgment, should not be set aside.

The affidavits disclosed the following transactions:—The defendant, who is the vicar of Chigwell, and curate of the perpetual curacy in the parish church of Theydon Bois, in Essex, in consideration of 2000*l.*, granted, in 1824, an annuity to the plaintiffs of 237*l.* 2*s.*, secured by a deed, a bond, and a warrant of attorney. By the deed, dated 3d September, 1824, which recites the concurrent act of giving the bond and the warrant of attorney, the defendant granted to the plaintiffs the said annuity of 237*l.* “payable out of and charged and chargeable upon all that the vicarage and parish church of Chigwell, in the county aforesaid, and all and singular the glebe lands, messuages or tenements, tithes &c., and appurtenances; and also by, from, out of, and upon all that the said curacy in the said parish church of Theydon Bois aforesaid, and the stipend, dues, customs, profits, and appurtenances.” The deed contained a power of distress upon the vicarage &c., a covenant for payment of the annuity, and a declaration that the bond and warrant of attorney, and the judgment to be forthwith entered up thereon, should be considered as further securities only for securing the payment of the annuity; and that immediately after judgment should have been so entered up, such measures might be taken *as were necessary for obtaining a sequestration*; and that if the annuity, or any part thereof, should be unpaid for 21 days, it should be lawful for the plaintiffs to proceed, under and by virtue of such sequestration, to sue

out such execution or executions upon the said judgment, by one or more writs of *feri facias de bonis ecclesiasticis*, or *de bonis propriis*, or both, or any other writ or writs whatsoever, or take or adopt such other proceedings as they should think fit, for the recovery of the arrears of the said annuity.

The bond, of the same date as the deed, was in the penal sum of 4000*l.*; and recited that the plaintiffs had contracted for the purchase of the annuity, and recited also that the deed above mentioned was conditioned for the payment of the annuity, subject to a proviso for the repurchase of it, at the option of the defendant, upon notice and payment of the sum of 2037*l.*

The warrant of attorney was of the same date, and contained an authority to appear in an action of debt upon a certain bond under the seal of the defendant, bearing even date therewith, for the sum of 4000*l.*, for money borrowed, at the suit of the plaintiffs, and thereupon to confess the action, or else to suffer judgment.

The defeazance recited that the warrant of attorney was given for better securing the said annuity, "as in and by the said condition to the bond referred to by the warrant of attorney is more particularly expressed;" and declared that if the annuity should be in arrear by the space of 21 days, it should be lawful for the plaintiffs to sue out execution or executions upon the judgment, by one or more writ or writs of *feri facias de bonis ecclesiasticis*, or *de bonis propriis*, or both, or any other writ, &c. (as in the deed).

In the affidavit of the defendant it was stated, that upon the treaty for the sale of the annuity it had been agreed that the deed, bond, and warrant of attorney should be given for the purpose of charging his benefices with the annuity.

Sir *J. Scarlett* and *F. Pollock* now shewed cause. This case is precisely the same as *Gibbons v. Hooper* (a). In that case a motion was made to set aside three warrants of

(a) 2 Barn. & Adol. 734.

1833.

 COLEBROOKE
 v.
 LAYTON.

1893.

 COLEBROOKE
 v.
 LAYTON.

attorney as a charge upon a benefice in *evasion* of 13 *Eliz.* c. 20. This the Court refused to do; and Lord *Tenterden* there says, "The deeds which the plaintiff sought to enforce by means of these warrants of attorney were good as grants of annuities, though void so far as they went to charge an ecclesiastical benefice. There is nothing in the defeazances of the warrants of attorney to shew that they were intended to bind the living more than in any other case where a clergyman gives the same security. If we held these void, we must set aside every warrant of attorney given by a clergyman holding a benefice, because its effect may ultimately be a sequestration of the living. The only question before the Court is, whether the warrant of attorney is to be set aside." The argument cannot be better presented to the Court than was done in that case. In answer to the argument against the validity of the warrant of attorney in that case, *Parke, J.* says, "Suppose a bond had been given for payment of the annuity; would it have been a good plea to an action on such bond; that it was given to secure the annuity by means of a sequestration?" The principle of the decision of the Court of King's Bench in *Gibbons v. Hooper* was afterwards affirmed in *Wynne v. Robinson (a)*. The result of that decision is, that if a beneficed clergyman merely grants an annuity without charging it on his benefice, and gives a bond and warrant of attorney for further security, the whole of the instruments are valid. On the other hand, if he grants an annuity charging it on his benefice, and the deed, bond, and warrant of attorney recite that they are given for the purpose of judgment being entered up and the living sequestered, then the instruments are invalid. In *Flight v. Salter (b)* the warrant of attorney recited that it was given to the intent that a sequestration might be obtained. There is no intermediate case between *Flight v. Salter* and *Gibbons v. Hooper*, viz. where the grantee of the annuity by deed seeks to charge the benefice, and the warrant of

(a) 4 Bligh, 27, New Series.

(b) 1 Barn. & Adol. 673.

attorney and bond are merely in the ordinary form in which a clergyman would give a security for any debt he might happen to owe. This is the case before the Court. So much of the grant of the annuity as charges the living is bad; the bond and the warrant of attorney are valid.

1839.

COLEBROOKE
v.
LAYTON.

Follett in support of the rule. It is not intended to impugn the decision in *Gibbons v. Hooper*. The rule laid down by the Courts, it is apprehended, is this:—If it appear that the warrant of attorney was given, as well as the deed, for the purpose of enabling the party to have recourse to the benefice, there the Court will set aside the warrant of attorney; but if the warrant of attorney be in the mere common form, so that nothing on the face of the warrant of attorney or the defeazance shews that it was intended that the party should have recourse to the benefice, and the deed contains no allusion to the warrant of attorney, the Court will not interfere. The attention of the Court has not been drawn to the affidavit, deed, bond, and warrant of attorney. The deed, bond, and warrant of attorney are executed at the same time. The deed recites that the defendant was entitled to the two benefices; that in consideration of 2000*l.* the defendant had agreed to grant the annuity, and that the annuity should be further secured by bond and warrant of attorney, with judgment to be entered up in pursuance of such warrant of attorney, for the purpose of charging the defendant's benefices. Then follows the grant of the annuity, charging the benefices with the payment of it. This is not a grant of an annuity similar to that in the case of *Gibbons v. Hooper*. Here, the grant in terms charges the two benefices, the glebe lands, and tithes. It is expressly declared in the deed that the warrant of attorney is given for the purpose of issuing a sequestration against the benefices. That distinguishes this case from *Gibbons v. Hooper*; for in that case the Court mainly relied on the circumstance that the grantor of the annuity could only issue the sequestration for the arrears of the

1833.

COLEBROOKE
v.
LATTON.

annuity then due, and consequently the warrant of attorney could not operate as a charge on the benefice more than any other warrant of attorney given for a debt. It is stated in the affidavit, and is not contradicted, that the deed, bond, and warrant of attorney were given for the express purpose of charging the vicarage and curacy. [*Littledale, J.* What the affidavit states is immaterial; we can only look at the securities which are given to enforce the payment of the money.] The defeazance itself to the warrant of attorney authorizes the defendants to issue a *fi. fa. de bonis ecclesiasticis* or *de bonis propriis*. The whole of these instruments are to be taken together. The question is, whether on the deed, bond, and warrant of attorney, the Court are not satisfied that this warrant of attorney was given for the purpose of charging the benefices. If the Court are so satisfied, then according to the decision in *Flight v. Salter* the warrant of attorney is bad. In *Flight v. Salter* the grant of the annuity contained a covenant by *Salter*, that it should be lawful for *Flight*, immediately after the execution of the deed, or at any other time, to procure a sequestration against *Salter* in respect of the said rectory, by virtue of the intended judgment to be entered of record, and to continue such sequestration during the continuance of the annuity, for the purpose of more effectually securing the payment thereof. Here the deed distinctly shews, that the object of the warrant of attorney was the issuing a sequestration against the benefices. It expressly states that the warrant of attorney was given for the purpose of being a permanent charge on the benefices. This statement is binding on the parties, although the defeazance itself contains no precise allegation that the warrant of attorney was given for that purpose. Supposing the statute of *Elizabeth* did not exist, and the plaintiffs in this case had issued a sequestration upon this warrant of attorney, the parties would be allowed to continue that sequestration, because when the defendant came to set aside the sequestration it would be said the defeazance refers to the bond, and the

bond to the annuity deed, and that the deed shews that it was the agreement of the parties that the sequestration should form a permanent charge. The object of getting the warrant of attorney is, that it shall be a charge on the benefices. The principle of the decision of the Court in *Flight v. Salter* was this, that the party there had attempted to do indirectly what the law would not allow him to do directly; that is, by the warrant of attorney and sequestration he had attempted to make a permanent charge on the benefice, which the law would not allow. If it can be collected from these different instruments that the judgment to be entered up in pursuance of the warrant of attorney was to be a charge on the benefices to secure the annuity, the warrant of attorney is bad, although the defeazance do not expressly state the intention of the parties. *Flight v. Salter* is precisely in point, unless it be held that the intent of the parties must be written down in words on the back of the warrant of attorney. The parties would be equally bound, whether the defeazance to the warrant of attorney was written on the back of that instrument, or inserted in the annuity deed. In *Gibbons v. Hooper* neither the warrant of attorney nor the defeazance referred to the deed. The warrant of attorney did not appear to be part of the transaction. The ground of the decision in that case was, that it did not appear that the warrant of attorney had been given for the purpose of issuing sequestration against the benefice. Here it being expressly stated in the annuity deed that the warrant of attorney was given for the purpose of creating a permanent charge on the benefices, and the warrant of attorney referring to the bond, and the bond reciting the annuity deed, the warrant of attorney is bad. In deciding otherwise the Court would allow a party to do indirectly that which he cannot do directly.

LITLEDAL, J.—I think that the rule in this case should be discharged. In *Flight v. Salter* it was recited in the defeazance, that the warrant of attorney was given to secure

1833.

 COLEBROOK
 v.
 LAYTON.

1833.

 COLEBROOKE
 v.
 LAYTON.

the annuity, which was to be a charge on the living. Here, the warrant of attorney is only in the common form, for a judgment to be entered up and execution issue as different arrears of the annuity shall be unpaid. The warrant of attorney does not refer to the deed. It is true, it mentions incidentally the bond; and the condition of the bond recites the deed, but the warrant of attorney itself says, that it is given to enter up judgment to secure the money in the bond. I do not think this warrant of attorney can be considered to operate as a charge on the living, in the same manner as the warrant of attorney was held to do in the case of *Flight v. Salter*. As to the proviso in the defeazance, that a *fi. fa. de bonis ecclesiasticis* may be taken out, that is only what might be done without such a clause.

TAUNTON, J.—I am also of opinion that this rule should be discharged; and in that opinion I am strongly fortified by the decision of this Court in *Gibbons v. Hooper*. I perceive that I was a concurring party in that judgment—I hope I am not prejudiced in its favour on that account. If I was disposed to place reliance on that case alone, I should refer to the authority of the other judges who coincided in that decision; but even putting that case completely out of sight, I am clearly of opinion that this rule should be discharged. The statute of 13 *Eliz.* c. 20, by which alone this Court has any authority on the subject, was not made for the purpose of setting aside annuities or matters of that description. The primary object of that statute was to avoid leases made by persons not ordinarily resident and serving their cures; and with this view the principal enacting clause is framed. This was one of the principal objects; and Lord *Kenyon* declared, in *Mouys v. Leake* (a), “that the reason of making that act was, because in former times the patron sometimes presented a needy incumbent, who, being content to take the living on any terms, agreed to grant leases in favour of the patron him-

Object of 13
Eliz. c. 20.

(a) 8 T. R. 415.

self.” (a) In the concluding part of the clause in question are these words: ‘that all chargings of such benefices’ shall be void; so that to bring a case within that statute there must be not merely an agreement to charge, not merely a contract to charge, but there must be an actual charging. Upon this ground the case of *Flight v. Salter* was decided; for there was there an absolute charging of the benefice itself, because in that case the warrant of attorney recited, that by an indenture, in consideration of a certain sum of money paid by *Flight*, *Salter* had granted to *Flight* an annuity of 300*l.* for 100 years, if *Salter* should so long live. And that indenture, which is recited in the warrant of attorney, contained a covenant by *Salter*, that it should be lawful for *Flight*, immediately after the execution of the deed, or at any other time, to procure a sequestration against *Salter* in respect of his rectory, by virtue of the intended judgment; and to continue such sequestration during the continuance of the annuity, for the purpose of more effectually securing the payment thereof. The deed was embodied in the warrant of attorney, and might properly be said to be incorporated therewith and to form part of it. It appears that the agreement also was, that the sequestration should forthwith issue and should be continued, although no default in the payment of the annuity might have taken place; and whether the annuity was paid or unpaid, the sequestration was in either case to issue. The sequestration must have been a continuing one, and operating directly as a ‘charging of the benefice.’ It was a continued incumbering on the benefice, even although the annuity should have been punctually paid. Then the warrant of attorney contained this clause: “It is hereby declared and agreed, that these presents are executed and given, and the judgment to be entered on record pursuant thereto is to be so entered for the purpose of securing the said annuity of 300*l.* at the time and in the manner aforesaid, and to the end and intent that a sequestration may be

1833.

 COLEBROOKE
 v.
 LAYTON.

(a) *Vide Doe d. Broughton v. Cressw.* 344; *Shaw v. Pritchard*, 5 *Gulley*, 4 M. & R. 249; 9 Barn. & M. & R. 180; 10 B. & C. 241.

1833.

COLEBROOK
v.
LAYTON.

obtained or procured and continued by *Flight*, his executors &c., pursuant to the hereinbefore recited indenture." This the Court considered as amounting to an express charging of the benefice; and therefore they held the case to be within the statute. In that opinion, if it be at all necessary, I express at the present moment my entire concurrence. But how stands the present case? This annuity is secured by a deed, in which undoubtedly there is a recital or statement that it is intended that the benefices shall be charged with the payment of the annuity; and if that deed had been incorporated with this warrant of attorney, and if the defeazance had stated that the warrant of attorney was given to effect the same purpose with that mentioned in the annuity deed, then the case would have been the same as that of *Flight v. Salter*; but this is not so. Here, there is also another instrument—the bond. That bond is only conditioned for the due and punctual payment of the annuity, and is a mere collateral security. The annuity is also secured by the warrant of attorney, which it is true refers to the bond; but this mere reference has not the effect of incorporating the annuity deed with the warrant of attorney and defeazance. The reason for referring to the bond in the warrant of attorney is merely to shew that the object of these two instruments was identical; viz, to secure the same annuity. The warrant of attorney in this case says, "Now it is declared and agreed between the said parties, that when and as often as the said annuity, or any part thereof, shall be in arrear and unpaid by the space of 21 days next after any of the days and times so appointed for the payment thereof as aforesaid, then and in such case it shall be lawful for the grantees to sue out such execution or executions upon the said judgment, by one or more writ or writs of *fi. fa. de bonis ecclesiasticis* or *de bonis propriis*, or both, or any other writ or writs, or to take and adopt such other proceeding or proceedings as they shall think fit for the recovery of the said annuity." This gives no power which an ordinary

grantee of an annuity would not have. There is merely a power to sue out any execution, of which the writ of *fi. fa. de bonis ecclesiasticis* is one, after the annuity shall have been so many days in arrear. And it is to be observed that it provides that security for the payment of the annuity only when it is in arrear. I cannot distinguish this from the case of any other warrant of attorney given by a clergyman for the security of a debt, in which it is a possible consequence that the benefice may be taken in execution. I really cannot by any means distinguish this case from the case of *Gibbons v. Hooper*. They appear to me to be the same in almost all the circumstances. Upon the whole I think it is clearly distinguishable from the case of *Flight v. Salter*, in this, that there the warrant of attorney operating as an express charge upon the living, a sequestration might have issued, although the annuity were not in arrear, and might have continued as a security for future payments; whereas here the benefices can be taken in execution only on the annuity's being in arrear.

1833.

 COLEBROOKE
 v.
 LAYTON.

PATTERSON, J.—I am entirely of the same opinion. The rule should be discharged. Mr. *Follett* asks, is it necessary that the intent of the parties should appear on the warrant of attorney itself? I do not mean to say that it is necessary that the intent of the parties should appear on the warrant of attorney or defeazance, but this I say, that it should appear on the warrant of attorney and defeazance, that the intention, whatever it may have been, was carried into effect. Now in the defeazance on this warrant of attorney, whatever may have been their intent, it is quite clear that they have not carried that intent into effect; for the defeazance does not make the warrant of attorney, or the judgment to be entered on it, a charge on the estate, so that the sequestration can be issued immediately, and continued from time to time. The defeazance only authorizes the issuing of the sequestration, that is, a writ of *fi. fa. de bonis ecclesiasticis*, in case the annuity shall be in arrear,

1833.

COLEBROOKE
v.

LAYTON.

Fi. fa. de bonis ecclesiasticis,
how far a
continuing
writ.

for the purpose of levying the arrears. As soon as that purpose is effected according to the defeazance, there is an end of the sequestration, or rather of the *fi. fa. de bonis ecclesiasticis*, which is not the sequestration, but that upon which a sequestration issues. The only difficulty I felt was upon the nature of that writ, which in the books is said to be a *continuing* writ. It is true that it is a continuing writ in general; but how continuing? Continuing until all that has been commanded to be levied is levied. All that can be levied under it here is, so much of the annuity as was in arrear at the time when the writ issued. It seems to me, therefore, that it cannot possibly be said, looking at the warrant of attorney and defeazance, that this warrant of attorney can be made to operate as a perpetual charge on the ecclesiastical benefice. Mr. *Follett* says, that the deed expresses that it is so to operate. It may be so; but I say that intention has not been carried into effect. I therefore see nothing to authorize us to set aside the warrant of attorney. I was not in Court when *Gibbons v. Hooper* was decided; but I perfectly agree with what was stated by the Court in every part. In *Kirlew v. Butts* (a) we certainly proceeded entirely on the ground that we could not set aside the warrant of attorney, when the defeazance did not express that it was to operate as a continuing charge upon the living. The Court would set aside any execution which operated in that way.

Motion to set
aside judgment
confessed upon an
illegal consideration,
said to be in
the nature of
an application
on the ground
of irregularity.

Sir *J. Scarlett*. In the unreported case of *Moore v. Ramsden*, the same point was decided. It is usual to discharge the rule with costs: which

Follett denied.

LITLEDAL, J.—I apprehend that, according to the usual course of practice, the rule must be discharged with costs. It is something in the nature of an application to the Court on the ground of irregularity.

Rule discharged, with costs.

(a) 2 Barn. & Adol. 736, n.

1833.

DOE dem. WILLIAM SMITH v. PIKE and HIGHETT.

EJECTMENT for a dwelling-house or cottage and garden in the parish of Burbage, Wiltshire. At the trial before *Taunton, J.* at the Salisbury spring assizes, 1830, the following facts appeared:—By indenture of 29th April, 1749, between *John Smith* of the first part, *Mary Elton* of the second part, and *Gilbert* and *Durnford* of the third part, *John Smith* conveyed the premises in question (inter alia) to *Gilbert* and *Durnford* and their heirs, to the use of *John Smith* until marriage with *Mary Elton*, and after marriage to the use of *John Smith* for life, remainder to *Gilbert* and *Durnford* to preserve &c., remainder to the wife for life in bar of dower, remainder to the heirs of the body of the husband and wife, reversion to *J. Smith* in fee. The marriage took place on the 1st May, 1749. *J.* and *M. Smith* had issue, their only son *John Smith*, born on the 24th March, 1752. *M. Smith* died in 1759, and *J. Smith*, the settlor, in 1767. On the 26th June, 1774, *John*, the son, married *Elizabeth Coblyn*, and by her had issue the claimant, born 26th May, 1778. *John*, the son, died in 1823. The seisin of *J. Smith*, the settlor, was proved, and it was shewn that after his death his son *John* took the rents until 1795. After that period the premises were enjoyed by the father of the defendant *Pike*, to whom, according to the verbal statement of a witness, *John Smith*, the son, had sold the property(a). The defendant claimed as heir, and *Highett* as mortgagee, of the elder *Pike*. It was contended by *Wilde*, Serjt. and *Bingham*, on the part of the defendants, that the possession of the *Pikes* unexplained must be taken to be adverse. For the plaintiff it was answered, by *Erskine* and *Manning*, that admitting that an adverse possession for 20 years against

A., donee in tail, enters and takes the profits; in the lifetime of *A.*, *B.* enters and takes the profits during 30 years, to his own use. *A.* dies. *C.*, his issue in tail, may enter upon *B.*, and is not bound to shew that the possession of *B.* was not adverse.

Where a judge left, as a question for the jury, a point which upon the evidence could only be determined one way, and the jury found a verdict against the evidence, the Court refused to grant a new trial, otherwise than upon payment of costs.

(a) It is understood that *John Smith*, the son, had in fact conveyed to *Pike* by lease and release, suppressing the settlement of 1749;

a fraud which, as Wiltshire is not a register county, he had no difficulty in effecting.

1833.

DOE
v.
PIKE.

J. Smith, the son, would have barred the entry of *William*, and that, as held by the Court of Common Pleas in *Tolson v. Kaye (a)*, no new rights of entry accrued to the successive issues in tail, yet there was nothing in this case from which such adverse possession could be inferred; that the *Pikes* might have received the rents to the use of *John Smith*, the son, and if not, the latter might have rightfully conveyed to *Pike* his own life interest; that the Court would not presume that the tenant in tail had wrongfully

(a) 3 Brod. & Bing. 217, and 6 B. Moore, 542, where it was held, that the 20 years within which a writ of formedon in descender must be sued under 21 Jac. 1, c. 16, s. 1, begin to run against the present and all future issue in tail, when the title descends to the first issue entitled to take after the commencement of the adverse seisin. This decision appears to have proceeded chiefly upon the construction put by the defendant's counsel (Mr. Serjt. Hullock) upon the words "first, descended, or fallen," which was assumed to refer to the descent from the donee to the first issue in tail. It seems probable that when the words "first, descended, or fallen" were adopted by the legislature, "first" was employed in the same almost redundant sense in which it is frequently used in acts of parliament, to exclude the possibility of supposing that because the right or cause of action was in its nature continuing, the period of limitation was not to be calculated from the commencement of such continuing right. Thus in 9 Geo. 3, c. 16, s. 1, the crown is prohibited from enforcing "any right or title which hath not

first accrued or grown, or shall not hereafter first accrue or grow within the space of 60 years next before the filing, issuing, or commencing of any such action &c." In *Stowel v. Lord Zouch*, Plowd. 374, the Court were divided, two judges (*Southcot* and *Weston*) against two (*Dyer* and *Catline*), upon the question whether each successive issue in tail had five years to avoid a fine levied by the discontinuance of the ancestor.

Sir *Thomas Jones*, who was one of the judges that decided the *Earl of Derby's* case, (T. Jones, 257, 2 Show. 104, Pollexf. 491, Sir T. Raym. 260,) appears to have approved of the opinions of *Southcot* and *Weston*, in favour of the successive issues in tail.

In *Tolson v. Kaye* a writ of error was brought in K. B. upon the judgment in C. P., but the plaintiff was compelled to compromise or abandon his claim from want of means; as, if he had succeeded in reversing the judgment, he must have gone down to try every one of the thirty issues in fact, behind which the tenant had been allowed to intrench himself, before he would have been entitled to judgment *quod recuperet*.

conveyed a greater estate than he was himself possessed of; and that if a recovery had been suffered the tenant would have no difficulty in producing the evidence. The learned judge, however, directed a nonsuit, and refused to reserve the point. In the following term *Erskine* obtained a rule nisi to set aside the nonsuit upon the grounds insisted on at the trial; against which, in Hilary term 1892,

1893.

Don
v.
PIKE.

F. Pollock and *Bingham* shewed cause. The elder *Pike* held the property for more than 20 years during the life of *John* the son. This possession was adverse to *John* the son, and his entry being barred by 20 years acquiescence, no new right of entry accrued to his son upon his death; *Tolson v. Kaye*. The possession, though adverse, is not necessarily wrongful, as the tenant in tail may have conveyed to *Pike* by fine or by recovery, and as a wrong will not be presumed, it must be taken that this long possession is referable to some conveyance by fine or recovery, which, if no such assurance had existed, might have been easily disproved by a search in the proper repositories.

Manning and *Follett* contra. The title of the lessor of the plaintiff was made out, and that title not being met by any proof of adverse possession, the plaintiff was entitled to recover. The case would have been less favourable if the claimant's father had never been in possession, but he having been in possession, the bare perception of rents and profits by another for twenty years does not create such an adverse possession as shall bar the right of entry by force of the statute of limitations. In a question of adverse possession the issue lies on the party setting it up. A wrongful possession cannot be presumed; *Hall v. Doe* (a), *Reading v. Rawsterne* (b). *J. Smith*, the father of the claimant, had a right to convey away the land for his own life. This is the only estate which, as tenant in tail, he

(a) 5 B. & Ald. 690; per Bayley, J.

(b) 2 Lord Raym. 830, second point.

1833.

DOE
v.
PIKE.

could rightfully make, and if he had affected to convey a fee simple by lease and release, the law would have restricted the operation of the conveyance to the simple grant of an estate for the life of the releasor. If the estate tail was absolutely destroyed by a recovery, or barred as against the issue, by a fine with proclamations, it would have been competent to the defendant to produce such document at the trial. It could not be incumbent on the plaintiff to shew that no such instrument existed, because the mere perception of rents and profits by the *Pikes* did not point to such assurance as necessary to account for such perception, which might be referred to an express grant for life; to a conveyance by lease and release in fee, which would operate as a grant for life; or even supposing the conveyance to be such as to defeat the estate tail, that effect might have been produced by a feoffment with warranty, binding the lessor of the plaintiff, if lineal, with assets, and if collateral even without assets. As no search would have enabled the plaintiff to ascertain whether any conveyance of the closes adverted to had been executed, he was not bound to institute an inquiry, in the result of which, even if he found no fine or recovery, he could place no confidence. The possession by the *Pikes*, even during the lifetime of the claimant's father, was not adverse to the estate tail. If it had been so, a question might have arisen whether, upon the death of his father seven years ago, a new right of entry did not accrue to the lessor of the plaintiff. Under the old statute of limitations, 32 *Hen.* 8, c. 2, though formedon in the remainder, and formedon in the reverter, were limited to 50 years after right of action accrued, no such restriction was imposed upon issues in tail, who might still bring their formedon in the descender at any distance of time. The statute of 21 *Jac.* 1, limits writs of formedon in the descender to 20 years after title descended or cause of action happening. The Court of Common Pleas, in *Tolson v. Kaye*, has carried the restriction much further, it is conceived, than was intended by the framers of the latter statute; for they can hardly be sup-

posed to have intended by a side-wind to introduce a new mode of eluding the statute de donis, without fine or recovery, in cases where the tenant in tail happened to live 20 years after parting with the possession of the entailed property. A writ of error is now pending in this Court upon the judgment of the Court of Common Pleas in *Tolson v. Kaye*, upon which errors have been assigned.

1833.

DOE
v.
PIKE.

Cur. adv. vult.

Lord TENTERDEN, C. J. in the course of Trinity term delivered the judgment of the Court.

The premises sought to be recovered had been in the possession of the *Pikes* for 30 years before the death of the claimant's father, and for seven years afterwards. We are of opinion that the possession cannot be taken to be adverse. It was contended by the defendant at the trial, that the possession must be taken to have been adverse to the title of the father, and that the issue in tail is barred when there has been an adverse possession for 20 years against his ancestor. The argument on the part of the plaintiff appears to have been put entirely on the ground of the probability that the rent was received by the *Pikes* to the use of the tenant in tail(a). The attention of the learned judge was not drawn to the case, that the perception of the rents by the *Pikes* might be referred to such a conveyance as a tenant in tail is authorized by law to make. The words of the statute 21 Jac. 1, c. 16, are, "that no person shall make any entry into any lands, tenements or hereditaments, but within 20 years next after his or their right or title, which shall hereafter first descend or accrue to the same, and in default thereof such persons so not entering and their heirs shall be utterly excluded and disabled from such entry after to be made." Here the father

(a) The learned judge had reported only the argument addressed to him by Mr. *Erskine*, who had

confined his observations to this point.

1833.

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Doe

v.

Pike.

had entered after the remainder in tail limited to him had taken effect, so that the case does not fall within the express terms of the statute, which bars all persons and their heirs not entering within 20 years after their right or title shall first accrue. One of the witnesses dropped an expression from which a sale might be inferred. The father may have sold an estate, so as to make a title against himself, but he could not bar his son except by fine or recovery. The long possession by the *Pikes* may have originated in a conveyance by lease and release, in which case the possession could not be adverse to the title of the issue in tail. It could not, therefore, be incumbent on the plaintiff to explain the possession of the defendants, and to negative a conveyance by fine or recovery. We are of opinion that this case must be referred to another jury.

Rule absolute.

On the second trial, before *Gaselee*, J. at the Salisbury spring assizes 1832, upon the cross-examination of the witness who proved the pedigree, he stated that the claimant was the eldest son of *John Smith* born in wedlock; but that two or three years before his marriage he had a son *John* by *Elizabeth Coblyn* then a servant, that this *John*, who bore his father's name of *Smith*, went for a soldier, and was reported to have married and left children, but had not been heard of for seven or eight years. Upon this the defendant's counsel contended that the possession was adverse, and cited *Tolson v. Kaye* (a), *Doe v. Prosser* (b), *Page v. Selfby* (c); that *John Smith* might have conveyed the premises by lawful conveyance, for which he cited 3 *Tho. Co. Litt.* 93, u.; and that by the descent from *Pike* the father to *Pike* the defendant, the entry of the lessor of the plaintiff was tolled.

(a) *Ante*, and see *Cotterell v. Dutton*, 4 Taunt. 826.

(b) 1 Cowper, 217.

(c) Buller's N. P. 102, b.

The defendant called no witnesses. The learned judge told the jury that it was for them to say whether *John*, the elder brother of the claimant, was legitimate, and that if he was found to be illegitimate, the questions would arise whether the possession of the *Pikes* was adverse, and whether the entry of the lessor of the plaintiff was tolled. The jury said that it was not proved that *John* was illegitimate. Upon which the learned judge answered, then it is proved that he is legitimate, and he has left children. The jury found a verdict for the defendants. In the following term *Coleridge*, Serjt. obtained a rule nisi for a new trial, on the ground that there was no evidence to warrant the verdict, and that the plaintiff had been taken by surprise, having no suspicion that his illegitimate brother was to be set up to defeat his claim; against which

1833.

Doz  
v.  
Pike.

*Bingham* now shewed cause. The plaintiff cannot rely upon the ground of surprise, as he has filed no affidavit in support of it. The defendant has relied all along upon this defect in the title of the lessor of the plaintiff. It was incumbent on the plaintiff to shew that his lessor was the eldest son of the donee in tail, and therefore he was bound to prove most distinctly that the elder brother was illegitimate. This he has failed to do. He proved a search for children of *John* and *Elizabeth Smith* in the parish in which they were married. He should have examined the registers of the adjoining parishes (*u*).

*Coleridge*, Serjt. and *Manning*, contra, were stopped by the Court.

By the COURT.—This rule must be made absolute, but it will be on payment of costs.

(*a*) In the register of the parish in which *Elizabeth Coblyn* lived before her marriage, the entry of the baptism of her son *John*, described him as illegitimate. This

entry, though it had been examined and transcribed by the defendant, was not known to the lessor of the plaintiff until after the second trial.

1833.

DOE  
v.  
PIKE.

For the plaintiff it was submitted, that this was not the ordinary case of a verdict against evidence; that here there was no evidence which ought to have gone to the jury on the question of legitimacy, as the only person who spoke to the existence of an elder brother, distinctly stated that he was illegitimate; that the submitting such evidence was a miscarriage in the learned judge, equivalent to a misdirection, and was equally prejudicial to the plaintiff as the former nonsuit; and that the effect of imposing upon the lessor of the plaintiff the payment of costs on both sides now, in addition to his own costs of the first trial, would be to deprive him of his estate without any default in him. The Court, however, said that the case must take the usual course of new trials after verdicts against evidence.

Rule absolute on payment of costs.

DEAN and another v. JAMES.

Where a debt is assigned, unless notice be given to the debtor, the assignor must be considered as continuing, within the purview of the bankrupt acts, to have the order and disposition of the debt until notice to the debtor of the assignment.

So, where one of two co-debtors releases his interest to his companion.

**ASSUMPSIT** for goods sold and delivered. Plea, first, non assumpsit, except as to 20*l.* parcel &c.; secondly, the bankruptcy of the plaintiff, *Dean*, whereby certain assignees *A. R. & J. D.* became entitled to all the estate and interest of *Dean* in the debts, sums of money, and causes of action in the declaration mentioned, except &c.; thirdly, as to the 20*l.* a tender. The replication to the second plea, so far as the same plea relates to the sum of 30*l.* other parcel &c. precluded non, because the promises in the declaration mentioned, so far as the same relate to the said sum of 30*l.* other parcel &c. were made after the assignment under the bankruptcy, absque hóc, that all the estate and interest of *Dean* in the said sum of 30*l.* other parcel &c. and the said causes of action in respect thereof, were bargained and sold

An allegation in pleading that a debt has been assigned does not import that notice of the assignment has been given to the debtor.

Held, that a plea of a tender of 20*l.* is supported by evidence of the tender of a larger sum, though such larger sum was tendered as the sum which the creditor was to receive, and not as the sum out of which he was to take the 20*l.*

to the said *A. R.* and *J. D.* modo et formâ; concluding with a verification. The replication as to the residue of the second plea, precludi non, because *Dean*, before he became a bankrupt, by indenture between *Dean* of the one part and *Davies* of the other part, for a good and valuable consideration him thereunto moving, assigned, transferred, and set over (a) unto *Davies* (inter alia) all the right, title, interest, property, claim, and demand whatsoever of *Dean*, of, in, to, from, out of and upon the said residue of the said several sums of money in the said declaration mentioned, over and above the said sums of 20*l.* and 30*l.* parcel &c., *by virtue whereof Davies was and is solely entitled to such residue.* Averment, that the action is brought by and in the names of both plaintiffs to recover damages in respect of the premises mentioned in the declaration, so far as the same relate to such residue, for the use and benefit of *Davies* solely and at his request, and that so far as relates to the promises relating to such residue, *Dean* is named in the declaration as a trustee for the purpose aforesaid, and not otherwise; concluding with a verification. Replication to the third plea, taking issue on the tender. Rejoinder to the first replication to the second plea, that all the estate and interest of *Dean* of and in the said 30*l.*, and the said causes of action in respect thereof, were bargained, sold, assigned, and transferred to the said *A. R.* and *J. D.* modo et formâ; concluding to the country. Rejoinder to the replication to the residue of the second plea, actio non, because protesting that *Dean* did not, before he became bankrupt, assign, transfer, and set over unto *Davies* all the right, title, claim, and demand of *Dean*, of, in, to, from, out of and upon such residue, for rejoinder the defendant saith, that *Davies was not* at the time of exhibiting the bill *solely entitled to such residue*, modo et formâ; concluding to the country. The plaintiffs demurred to the rejoinder of the

1833.

DEAN  
v.  
JAMES.

(a) An assignment from one of two joint tenants to the other enures as a release, divesting, as it would appear, not only the beneficial but the legal interest of the lessor. *Quare*, therefore, whether

the effect of the transfer was not to vest the legal estate and right of action in *Davies* only. See Co. Litt. But this objection was not taken.

1833.

DEAN  
v.  
JAMES.

defendant to the second replication to the second plea, assigning for causes of demurrer, that the defendant had attempted to put in issue mere inference and matter of law, viz. whether *Davies* did or did not become solely entitled to the said residue as in the said replication mentioned, under and by virtue of the said indenture therein stated to have been made between *Dean* and *Davies*, the rejoinder admitting the indenture as set forth in the replication, and traversing mere deduction and conclusion of law; secondly, that defendant had not directly traversed or confessed, and avoided the indenture or the replication; thirdly, that defendant had not taken any certain or definite issue, so that it remained doubtful what precise matter was intended to be put in issue by the rejoinder; fourthly, that the rejoinder is argumentative, ambiguous, vague, and multifarious. Joinder in demurrer.

*Manning* in support of the demurrer. The virtue *cujus* is a mere inference of law, from matters previously and distinctly alleged, and is not traversable. Such a traverse would mislead the Court and jury, as it could not be known whether the party traversing meant to insist that the facts alleged did not warrant the inference, or that some of the facts were untrue, or that, if true, their effect was altered by other facts not set forth in the pleadings; *Forth v. Stanton* (a).

*Stephen*, Serjt. contrâ. The plea contained a direct allegation that *Dean's* interest in the portion of the debt not covered by the tender had been assigned, and upon that allegation the plaintiffs were bound to take issue. They have done this in effect with reference to 30*l.*, by concluding with a special traverse *absque hoc*, that the debt as to this sum was assigned. But after this, the plaintiffs appear to have lost their way. The replication as to the residue of the debt neither denies nor confesses and avoids the assignment. [Lord Tenterden, C. J. That would

(a) 1 Saund. 210, 211 n.

only be ground of special demurrer.] Another objection to the replication is, that it does not show that the defendant had notice of the assignment from *Dean* to *Davies*, and in the absence of such notice *Dean's* interest in the debt must be considered to continue in his "possession, order and disposition," and would pass to the assignees, notwithstanding any transfer not communicated to the debtor; *Ryall v. Rowles* (a), *Gordon v. East India Company* (b), *Munro, Ex parte* (c), *Burton, Ex parte* (d), *Usborne, Ex parte* (e).

1833.



DEAN  
v.  
JAMES.

*Manning* in reply. The assignment being made not to a stranger, but to a party already a creditor, the same necessity for notifying the change does not exist. But if notice was necessary, the want of notice should have been rejoined. The allegation that *Dean* assigned all his right, title, interest, property, claim and demand whatsoever, imports, *prima facie*, that all steps had been taken which were necessary to give effect to the assignment, and if the defendant had taken issue upon the assignment to *Davies*, notice to the defendant must have been proved, as far as notice was necessary, to give validity to that transaction.

LORD TENTERDEN, C. J.—Notice to the debtor of the assignment of the debt is equally necessary, whether the assignee is a stranger or a co-dettee. In either case, until notice, the debtor would be discharged by a payment made to the assignor, as he continues to be in the apparent ownership of the debt. The allegation of an assignment or a release to *Davies*, does not imply notice to the debtor, because the interest vests in the assignee immediately upon the execution of the deed, without notice to the debtor, which notice is necessary only for the collateral purpose of putting an end to the apparent ownership.

*Manning* applied for leave to amend upon the terms of

(a) 1 Vesey, sen. 349.

(d) 1 Glyn &amp; Jameson, 207.

(b) 7 T. R. 228.

(e) *Ibid.*

(c) 1 Buck. 300.



1853.  
 DEAN  
 v.  
 JAMES.

the costs of the amendment being made costs in the cause, on the ground that the defendant had misled the plaintiffs by putting in a bad rejoinder, instead of demurring to the replication.

Lord TENTERDEN, C. J.—I see no reason to deviate from the ordinary course.

Leave to amend upon payment of costs.

The plaintiffs, without amending their replication, carried down the issues to *Nisi Prius*. At the trial before *Dennan*, C. J., at the sittings at Westminster after last Michaelmas term, the plaintiffs having failed in proving a demand ultra the 20*l.* alleged to have been tendered, and the 30*l.* covered by the demurrer, the cause turned upon the plea of tender, in support of which one *Schofield* stated, that he was sent by the defendant with 20*l.* 9*s.* 6*d.*, in bank notes and silver, to the plaintiffs, and offered to pay them that sum as the whole amount due. The learned judge being of opinion that this was proof sufficient to support the allegation of a tender of 20*l.*, directed the jury to find for the defendant, and the jury returned a verdict accordingly. In this same term *Law* obtained a rule nisi for a new trial; against which,

*Thesiger* was about to shew cause, when he was stopped by the Court.

*Law* and *Manning* in support of the rule. It appears to have been considered at *Nisi Prius*, that the case was governed by the resolution in *Wade's case* (a), as establishing the principle that the tender of a larger sum was a good tender of a smaller. But upon referring to the pleadings in that case, it will be seen that nothing more was there decided than this, that where a large sum is produced, and the creditor is requested to take a specific smaller sum out

(a) 5 Co. Rep. 115.

of it, the creditor cannot treat that as an insufficient tender, because the sum offered to be paid is produced from the same bag and laid upon the same table with other moneys *which the debtor does not offer to pay*. In that case, it being necessary, to save a forfeiture, that 250*l.* should be paid on a certain day, *Foxcroft*, the debtor, sent his son with 250*l.*, partly in English money and partly in French and Spanish money, made current by proclamation. The creditor refused the money, without however objecting specifically on the ground of the money being foreign<sup>(a)</sup>. *Foxcroft* then tendered thirty-four shillings, with the English money already in the bag, requesting the creditor to take so many of the shillings as would, with the rest of the English money, make up the 250*l.* This he refused to do. It would obviously have been attended with no greater difficulty to count off eighteen shillings, or whatever the proper number might be, from the thirty-four, than to count it from a heap consisting of eighteen parts only. The point, however, now in dispute arose in *Watkins v. Robb*<sup>(b)</sup>, where it was reserved by *Buller, J.* for the opinion of the Court, the learned judge expressing it as his own opinion that proof of a tender of 4*l.* 19*s.* 6*d.* would not support a plea of tender of 4*l.* 9*s.* 6*d.* In *Holland v. Phillips*<sup>(c)</sup> the point does not appear to have been raised, and probably in the conversation there alluded to, the precise sum of 17*l.* had been stated by the defendant to be the balance. In *Cadman v. Lubbock*<sup>(d)</sup>, the plea alleged a residue of 1*l.* 13*s.*, the sum produced was 2*l.* There, however, the sum offered to be paid was not the 2*l.* produced, but the 1*l.* 13*s.* alleged to be due. Here the defendant states upon the record that the debt is of a different amount from that which he acknowledged to be due at the time he made the tender. It is true that the 20*l.* being produced in bank-notes might have been readily separated from the 9*s.* 6*d.*; but if the rule be adopted generally, that the tender of a larger sum

1833.

DEAN  
v.  
JAMES.

(a) The creditor was merely watching for the forfeiture.

(b) 1 Esp. N. P. C. 711.

(c) 6 Esp. N. P. C. 46.

(d) 5 Dowl. & Ryl. 289.

1833.

DEAN  
v.  
JAMES.

may in all cases be pleaded as the tender of a smaller, it would follow that if nineteen guineas were tendered in satisfaction of a debt of 19*l.* the party would be obliged to accept more than that which he knew to be the sum due; *Spyberg v. Hyde(a)*, *Raven v. Griffith(b)*. If a debtor were allowed to tender one sum and then to plead the tender of a smaller sum, the creditor would be under considerable difficulties of replying a prior or subsequent demand of the sum actually tendered. [*Littledale J.* He might reply the facts.]

*Per Curiam*.—This case is within the principle of *Wade's* case.

Rule discharged.

(a) 1 Campb. 181.

(b) 5 B. & A. 630.

#### BINGHAM v. ALLPORT.

A tender made to the managing clerk of the plaintiff's attorney, who at the time disclaims authority from his master to receive the debt, is insufficient.

**ASSUMPSIT.** Plea, general issue as to the demand, except as to 15*l.* parcel of, and as to that sum a tender and refusal. At the trial before *Bayley, B.* at the last spring assizes for the county of Warwick, the defendant, in order to support the plea of tender, proved that he had gone to the office of the plaintiff's attorney, where he found only his clerk, to whom he tendered the money; that the clerk was at first willing to receive it and was about to give a receipt, but afterwards said that he had no authority from his principal to receive the money or to give a discharge from the debt. The learned judge told the jury that if they thought the clerk had *disclaimed* all authority to receive the money, the tender to him was insufficient. The jury returned their verdict for the plaintiff, but leave was given to the defendant to move to set aside that verdict and to enter it for the defendant. A rule nisi to that effect having been obtained in last Easter term,

*Humfrey* and *M. D. Hill* now shewed cause. The finding of the jury after the direction of the learned judge, was

a finding of a disclaimer by the clerk of authority to receive payment. In *Wilmott v. Smith*(a), the clerk to whom the tender was made did not disclaim authority to receive payment, but said only that he could not receive *the sum tendered*. In *Moffatt v. Parsons*(b), the clerk to whom the tender was made had been previously authorized to receive money for his muster. In *Blow v. Russell*(c), the agent disclaimed having any authority to receive less than the sum demanded, and it was even there held that a tender to him of a smaller amount was not a good tender, the ground of the decision there being that the agent to whom the tender was made had not discretion. There is no discretion here. The rule now sought to be established is at variance with the authorities, which shew that a tender, made to an attorney who expressly denies his authority to receive, is not good.

*Clarke, K. C., contra.* The authority disclaimed was an authority to receive less than the whole amount claimed. The facts proved showed that the clerk had authority to receive the whole if it had been tendered. This was the managing clerk of the attorney, who must be presumed to have the same discretion as the attorney himself, and therefore in this respect the case differs from that of *Blow v. Russell*, which at the trial was quoted as an authority for the defendant. The other cases mentioned are also authorities for the defendant. In *Barrett v. Dere*(d), it was held that payment made to a person found in a merchant's counting-house, and appearing to be interested with the conduct of the business there, was good payment to the merchant, although in fact the person was never employed by him.

LITLEDALE, J.—There is no ground for disturbing the verdict. It does not appear to me that the clerk had any authority. Had he been shewn to have been authorized to receive the money, it appears from the case of *Moffatt v. Parsons*, that he could not have disclaimed it. Although a party put his case into the hands of his attorney, who thereby

1833.  
BINGHAM  
v.  
ALLPORT.

(a) 1 Moody & M. 238.

(b) 5 Taunt. 307.

(c) 1 Carr. & Payne, 365.

(d) 1 Moody & M. 200.

1833.

BINGHAM

v.

ALLPORT.

becomes authorized to accept payment, it by no means follows that all the attorney's clerks have such an authority also.

TAUNTON, J.—I am also of opinion that the clerk had no authority. The case of *Moffatt v. Parsons* is distinguishable from that before the Court, because there the tender was made to a constituted agent, authorized to receive the money.

PATTESON, J.—It was left to the jury to say whether the clerk disclaimed or not. It is now quite impossible for us to direct a verdict to be entered for the defendant; nor can we grant a new trial on the ground that the verdict was against evidence, because of the smallness of the damages.

Rule discharged.

### RULE OF COURT,

*Signed by the fifteen Judges.*

IT IS ORDERED, That in case a Rule of Court or Judge's Order for returning a bailable writ of *capias* shall expire in vacation, and the sheriff or other officer having the return of such writ, shall return *cepi corpus* thereon, a Judge's Order may thereupon issue, requiring the sheriff or other officer, within the like number of days after the service of such order, as by the practice of the Court is prescribed with respect to rules to bring in the body issued in term, to bring the defendant into Court by forthwith putting in and perfecting bail above to the action; and if the sheriff or other officer shall not duly obey such order, and the same shall have been made a Rule of Court in the term next following, it shall not be necessary to serve such Rule of Court or to make any fresh demand thereon, but an attachment shall issue forthwith for disobedience of such order, whether the bail shall or shall not have been put in and perfected in the meantime.

### MEMORANDA.

IN the course of this term, *Thomas Noon Talfourd*, Esq. was called to the degree of Serjeant at Law, and gave rings with the motto, "*Magna vis veritatis*."

In the vacation after this term, *David Pollock*, Esquire, *Philip Courtenay*, Esquire, *John Blackburne*, Esquire, and *William Henry Maule*, Esquire, were appointed his Majesty's counsel learned in the law.

# CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

EASTER TERM,

IN THE THIRD YEAR OF THE REIGN OF WILLIAM IV.

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APOTHECARIES' COMPANY v. COLLINS, M. D.

1833.

**DEBT** for penalties under 55 *Geo.* 3, cap. 194. The defendant was a physician with a diploma from a *Scotch* University(a), practising in the county of Dorset, and also dispensing medicines as an apothecary. At the trial before *Park, J.* at the last spring assizes for the county of Dorset, a verdict was taken for one penalty of 20*l.*

A physician with a diploma from a Scotch University cannot as such dispense medicines in England without complying with the terms of the Apothecaries' Act, (55 *Geo.* 3, cap. 194.)

*Barstow* now moved for a rule nisi for a new trial. There is no fact at all in dispute in this case, the action having been brought merely for the purpose of deciding a question of great importance to the Apothecaries' Company on the one side, and physicians with Scotch diplomas practising as apothecaries, on the other. The question is, whether such physicians may act as apothecaries in England without having complied with the terms of the act for regulating

(a) Aberdeen.

1833.  
  
 APOTHECARI-  
 ES'  
 COMPANY  
 v.  
 COLLINS.

the practice of apothecaries. By the 14th section of 55 Geo. 3, c. 194, it is declared "that it shall not be lawful for any person to practise as an apothecary in any part of England and Wales, unless he shall have been examined by the Court of Examiners, and have received a certificate of his being duly qualified to practise as an apothecary, from the said Court of Examiners." By the 29th section it is enacted, "that nothing in the act contained shall extend to interfere with any of the rights, authorities, privileges, and immunities theretofore enjoyed by either of the two Universities of Oxford or Cambridge, the Royal College of Physicians, the Royal College of Surgeons, or the said Society of Apothecaries respectively, or of any person practising as an apothecary previously to the 1st day of August 1815." It is upon this latter section that the Apothecaries' Company place reliance. This section was, however, copied from the exemption clause in an old act, which was passed before the union of Scotland with England. Since the time of the Union the College of Physicians have never called in question the right of physicians with Scotch diplomas to practise in England or Wales. In the case of *Smith v. Taylor (a)*, which was an action for defamatory words spoken of the plaintiff in his character of a physician, Sir *James Mansfield*, in delivering his judgment, thus expresses himself:—"Since the union with Scotland, it has been considered (though I do not exactly know upon what ground) that a degree conferred by a *Scotch* University is of the same effect as a degree conferred by the Universities of Oxford or Cambridge, though in looking through the articles of Union, I find nothing upon the subject except that the four *Scotch* Universities shall subsist as before, with the same rights. Had the matter been attended to at the Union, some express provision would probably have been made; but although no such provision was made, it has been generally understood, that in consequence of the clause alluded to, a diploma granted by one of the *Scotch* Universities, gives

(a) 1 New Rep. 203.

the same right to practise physic, as a degree at one of the English Universities, and dispenses with the necessity of being examined by the College of Physicians and obtaining letters testimonial from thence." The diplomas of Scotch Universities are entitled to equal consideration with those of the Universities of England. [*Denman*, C. J. How do you purpose to get over the express words of the act?] There certainly is much difficulty, and all that can be done is to refer the Court to the practice of the College of Physicians. The question is one of the greatest importance, for if the Court should be of opinion that a Scotch diploma does not exempt a physician from being subject to the regulations of the apothecaries' act, those who are now engaged in practice as apothecaries with a Scotch diploma, must either at once quit their profession or bind themselves as apprentices to apothecaries, undergo examination, and obtain a certificate from the Court of Examiners of the Apothecaries' Company. Under these circumstances, it is hoped that the Court will not refuse to grant a rule nisi.

**DENMAN, C. J.**—It is quite clear that all persons are included in the prohibitory clause except those specifically exempted by the 29th section. Now in this latter clause, Scotch Universities are not mentioned. The very circumstance of so many individuals being concerned in this question, is a reason why the Court should not grant even a rule nisi, when it appears to them perfectly clear that Scotch Universities are not included.

**LITLEDALE, J.**—The 14th section of the act applies to all persons whatever. It would extend to persons having medical decrees at the English Universities, to members of the College of Physicians and of the College of Surgeons, did not the 29th clause expressly reserve to them their former rights and privileges. It does not allude to Scotland, for the act applies only to England and Wales.



1833.  
 APOTHECARI-  
 ES' COMPANY  
 v.  
 COLLINS.

PARKE, J.—The words of the act are too plain to be got over. The 14th section excludes all persons who do not obtain a certificate from the Court of Examiners of the Apothecaries' Company. That is a general prohibition of all that do not fall within that class. But then there is in the 29th section an exemption in favour of the English Universities and the Colleges of Physicians and Surgeons, and of those who were already in practice. Their rights are reserved. There is no exemption whatever in favour of any of the Irish or Scotch Universities. By the 5th section the duties of apothecaries are defined. It is there stated to be the duty of every person, using and exercising the art and mystery of an apothecary, to prepare, with exactness, and to dispense such medicines as may be directed by any physician lawfully appointed to practise physic by the president and commonalty of the faculty of physic in London, or by either of the two Universities of Oxford or Cambridge. Whatever other rights Scotch physicians may have, this duty cannot be performed by them.

Rule refused.

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THE KING v. The HUNGERFORD MARKET COMPANY.  
 —In the matter of JOHN STILL.

A person whose legal tenancy had been determined by notice to quit, was held to be entitled to compensation for goodwill under the Hungerford Market Act.

BY the 11th of *Geo. 4*, cap. 70, certain persons were incorporated by the name of "The Hungerford Market Company." By the second section of the act, when the conveyances of the Hungerford estate, which had been contracted to be purchased by the individuals formed into the Company, should have been executed, the Company was empowered to treat for, purchase and take, all or any of the several subsisting leases or agreements for leases, of or in any part or parts of the said premises, and also to purchase the hereditaments mentioned in the first schedule to the act annexed.

By the 6th section it was provided, that if any person interested in the messuages in the first schedule to the act annexed particularly mentioned and described, or any part or parts thereof, or any occupier or occupiers thereof, sustaining any loss, injury, or damage, should for the space of twenty-one days next after notice in writing, signed by the clerk of the Company, neglect or refuse to treat or agree, or should not agree for the sale, then the said Company should cause the value and recompense to be made for such messuages to be inquired into and ascertained by a jury of the city of Westminster; and the Company was empowered to issue a warrant under their common seal, requiring the High Bailiff to impanel, summon and return a jury for that purpose. By section 17, it was enacted, that every lessee or tenant for years or at will, mortgagee, and every other person in possession of any messuages, wharfs, lands, or hereditaments which should be purchased by virtue and for the purpose of the act, should deliver up the possession of such messuages, wharfs, lands, or hereditaments, to the Directors of the said Hungerford Market Company, or to such person or persons as the Directors should appoint to take possession of the same, upon having three calendar months' notice from the Directors, or the person or persons so appointed by them, to quit the same at such time or times as should be required by such notice, the Directors making such satisfaction or compensation to every such tenant or lessee as aforesaid (except a mortgagee), in case he or she should be required to quit before the expiration of his, her, or their term in the premises, as to the Directors should seem just and reasonable; and in case any dispute or difference should arise touching or concerning the same, such satisfaction and compensation should be settled and ascertained by a jury in such and the like manner as the satisfaction and compensation to be made by the Company or their Directors, for the purchase of any messuages &c. was therein directed to be settled and ascertained, in case of any dispute or difference about the same.

1833.  
  
 The KING  
 v.  
 HUNGERFORD  
 MARKET.  
 COMPANY.

1833.  
 The KING  
 v.  
 HUNGERFORD  
 MARKET  
 COMPANY.

The 18th section directed, that the person in possession should deliver up the premises; and in case of refusal, authorised the Company to issue their precept to the sheriff to deliver the possession to them, and the sheriff was required to deliver the possession accordingly.

The 19th section enacted, that all persons tenants for years, from year to year or at will, occupiers of all or any part of the said old market, market-house, messuages, shops, buildings, wharfs, and other hereditaments forming the estate called Hungerford House or Hungerford Inn, or therewith contracted to be purchased by the Company, who should or might sustain or be put unto any loss, damage, or injury, in respect of any interest whatsoever for goodwill, improvements, tenants, fixtures or otherwise, which they then enjoyed by reason of the passing of that act, should and might have and receive all and every such benefit and advantage by way of compensation from the Company for every such loss, damage, or injury, by such and the same means as were therein enacted and provided for, and in respect of the person or persons, tenant or tenants of all and singular the hereditaments in the first schedule to the act contained.

In Michaelmas term 1832, *F. Kelly* had obtained a rule nisi for a mandamus, commanding the Company to issue a warrant to the High Bailiff of Westminster, thereby requiring him to impanel a jury, for the purpose of assessing the damages and recompense to be given to *John Still*, by way of compensation for the injury which he had sustained and should or might sustain, by being compelled to leave the messuage, tenement, and premises which he then occupied in Hungerford Street, in or near adjoining the said estate called Hungerford House or Hungerford Inn, and which the said Company had purchased or contracted to purchase of the Rev. *Henry Wise*, and for the loss, damage, or injury in respect of any interest whatsoever, for goodwill, improvements, tenants, fixtures or otherwise, which he had sustained, and should or might sustain or be put unto, by reason of the passing of the said act of parliament.

From the affidavit filed on behalf of the Company, it appeared that the Company purchased of Mr. *Wise* the old Hungerford Market estate, which included the house occupied by *John Still*, and it was agreed that the Company should be entitled to the rents and profits from the 24th of June 1830. A lease had been granted by Mr. *Wise* to one *William Whitebrook*, which expired on the 24th day of June, 1830. *Whitebrook* had underlet the premises to *Tritton*, who had again underlet the house to *Still*. Notice was given to *Tritton* that the premises were wanted by the Company for the purposes of the act, and it was agreed between the Company and *Tritton* that the latter should hold possession of the house until it was required to be taken down. From the affidavits filed on behalf of *Still*, it appeared that he took possession of the house at Christmas 1828, and paid to the outgoing tenant 412*l.* for the good-will and fixtures of the premises; that he had continued in the occupation of the house up to the present time, and during his tenancy had expended large sums of money in promoting the said business, making improvements in the said premises, and securing an extensive trading connexion; that the workmen employed by the Company had recently pulled down the adjoining house, and had rendered the house in question so unsafe that he had quitted it; that he was ready to give up the possession of the house upon the Company's undertaking to summon a jury; and that he was tenant from year to year of the premises in question, and had never assented to any alteration in the terms of his tenancy.

Sir *J. Scarlett* now shewed cause. The claimant cannot be entitled to any compensation for the goodwill of his trade. The landlord of the claimant held under a lease which had expired, and had received notice that the premises would be wanted by the Company. The owner of the freehold is not obliged to renew a lease, and there is no reason, therefore, why upon the expiration of the existing lease he

1833.  
  
 The KING  
 v.  
 HUNGERFORD  
 MARKET  
 COMPANY.

1893.

~  
The KING  
v.

HUNGERFORD  
MARKET  
COMPANY.

should not be at liberty to dispose of the whole interest in the premises.

*F. Kelly and Tomlinson* in support of the rule. This case falls within the numerous cases decided by this Court, in which it has been held that the tenant is entitled to compensation. In the case of *Ex parte Farlow*, in the matter of *The Hungerford Market Company* (a), the Court decided that the tenant who held from year to year was entitled to compensation. Lord *Tenterden* there says, "The 19th section is certainly obscure and incorrectly worded, but it provides compensation for all persons who shall sustain any damage or injury 'in respect of any interest whatsoever, for goodwill, improvements, tenants, fixtures, or otherwise, which they now enjoy, by reason of the passing of this act.' Now it seems perfectly clear that if this act had not passed, the tenants and occupiers would not have been all dispossessed as they will be under the act. It is said 'the interest they now enjoy' must be taken to mean a legal interest, and that all legal interest was determined by the notice to quit. But I think this is not the fair meaning of the words, and that they must be understood as signifying that sort of right which an occupier ordinarily has, of parting with his tenancy to another person for such sum as he may be induced to give for goodwill, fixtures, and improvements, and which is often very considerable, though the tenancy be only from year to year, where there is a confidence that it will not be put an end to." This party, at the time of the passing of the act, had an interest; two years before he had paid for the goodwill and fixtures, and had laid out money upon the premises and improved his business. No act was done by the Company until more than twelve months after the expiration of the lease, the tenant held on after the expiration of the lease, and was entitled to consider himself as tenant from year to year, upon the terms of the lease,

(a) 2 B. & Adol. 341.

It is sworn that the goodwill of the premises might have been sold, and that one family had been tenants upon the estate for two centuries. In the case of *Ex parte Wright*(a), the tenant's interest had expired, and the landlord had the option of determining the tenancy upon giving three months notice to quit; besides which there was a stipulation that the tenant should not underlet the premises.

When the Company purchased the reversion, they would, in fixing the price to be given, in all probability make an allowance for the sum to be given to the tenant by way of compensation.

By the COURT (b).—There is no distinction between this case and the case of *Ex parte Furlow*.

Rule absolute.

(a) 2 B. & Adol. 348.

(b) *Denman, C. J., Parke, J. and Littledale, J.*

1833.  
The KING  
v.  
HUNGERFORD  
MARKET  
COMPANY.

#### WILSON v. BARKER and MITCHELL.

**TRESPASS** for assaulting plaintiff, and taking from him a gun. Plea, not guilty. At the trial of the cause before *Alderson, J.*, at the Yorkshire spring assizes, 1833, it appeared that whilst the plaintiff was shooting grouse upon the moors near Melton, in Yorkshire, he was seized by *Mitchell* and deprived by him of his gun. The gun was afterwards delivered by *Mitchell* to *Barker*, who, upon application, refused to deliver it up to the plaintiff. The learned judge was of opinion that, under the circumstances of the case, *Mitchell* had no power to act as he had done, and was therefore liable to an action of trespass, but thought that the evidence was not sufficient to connect *Barker* with the assault; remarking, at the same time, that for the purpose of fixing both defendants, the action should have been in trover. The jury, under his lordship's direction, found a verdict against *Mitchell* for the value of the gun, and acquitted *Barker*.

Subsequent assent to a trespass will not make the assenting party a co-trespasser, unless the trespass was committed for his benefit.

1833.

WILSON  
v.BARKER  
and MITCHELL.

*Alexander*, on behalf of the plaintiff, now moved to set aside the verdict, and for a new trial, as against *Barker*. Though the trespass was in fact committed by the hand of *Mitchell*, yet *Barker* by his subsequent conduct adopted the act of *Mitchell*, and made himself liable as trespasser. In the case of *Bodkin v. Powell* and others(a), an action in which the pound-keeper was joined in trespass for taking and detaining the plaintiff's cart and horses, *Aston, J.*, in delivering his opinion, said, "here the defendant, *Chancellor*, only did the duty of his office, by impounding the cart and horses brought to him by the other defendants. The cases where a party concerned in any subsequent stage of the business is held liable to an action, are, where he renders himself so by assenting to the original trespass. But here is no assent to the trespass." *Aaron v. Alexander* and others(b), was an action of trespass and false imprisonment. The defendants justified under a warrant granted by a judge upon an indictment found for an assault. The plaintiff was apprehended through mistake, by two of the defendants, and brought to and detained at a watch-house kept by the third defendant *Solomons*, who was a constable. Lord *Ellenborough* said, "I think *Solomons* was in point of law a trespasser, although he had no means of knowing the person of the individual named in the warrant." [*Litledale, J.*—In that case there was a detainer by *Solomons*. Now every detainer of the person is an imprisonment.] *Hull v. Pickersgill* and others(c), was an action of trespass for seizing plaintiff's goods. Plaintiff was an uncertificated bankrupt, and had subsequently to his bankruptcy contracted debts to the defendants, who, for the purpose of securing themselves, entered his house and seized his goods. After the committing of this trespass, the assignees of the bankrupt surrendered to the defendants all the interest which they had in the goods. *Dallas, C. J.*, in giving judgment, says, "the rule of law is, that he for

(a) Cowper, 476. (b) 3 Campb. 35. (c) 1 Brod. &amp; Bingh. 262.

whom a trespass is committed is no trespasser unless he agree to the trespass, but if he afterwards agree to it, his subsequent assent has relation back, and is equivalent to a command, according to the well-established maxim *omnis rati habitio retrotrahitur et mandato priori æquiparatur*. It cannot be contended here, that the assignees themselves had not a right to seize the goods, and therefore by their subsequent assent they have in effect commanded the act complained of." Upon the same principle as that upon which it is decided that the assignees might adopt the act of the defendants in that case, *Barker*, by his subsequent conduct, might assent to and adopt the act of *Mitchell*.

1838.  
WILSON  
v.  
BARKER  
and MITCHELL.

PARKE, J.—In order to make a party liable as trespasser by a subsequent adoption of the trespass of others, it is essential that the act should have been done for his benefit. In the 3 *Coke's Institute*, is the following passage:—"By the law of the forest, whosoever receiveth within the forest any such malefactor, either in hunting or killing, knowing him to be such a malefactor, or any flesh of the king's venison, knowing it to be the king's, in this case he is a principal trespasser; wherein the law of the forest differeth from the common law; for by the common law, he that receiveth a trespasser, and agreeth to a trespass after it be done, is no trespasser, unless the trespass were done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment, for in that case *omnis rati habitio retrotrahitur et mandato æquiparatur*. But by the law of the forest such a receiver is a principal trespasser, though the trespass was not done to his use as well as the procurer's and plotter's."

By the COURT.

Rule refused.



-1833.

BOLTON, Administratrix of TIMOTHY BOLTON,  
v. DUGDALE, Executrix.

An instrument whereby the plaintiff acknowledges a loan of money, and promises repayment, and engages to pay an unliquidated demand out of the interest, and to pay the principal and the remainder of the interest to the lender, his executors, administrators and assigns, is not a promissory note, and it is properly stamped with an agreement stamp.

**ASSUMPSIT** for money lent. At the trial before *Alderson, J.*, at the Yorkshire spring assizes, 1833, in order to prove the loan of the money by *Timothy Bolton* to the testator, the following instrument, stamped with a 1*l.* agreement stamp, was offered in evidence:

"Received and borrowed of *Timothy Bolton*, labourer, in Blackburne, in the county of Lancaster, the sum of 30*l.*, which I do hereby promise to pay, together with the interest at the rate of 5*l.* per cent. I also promise to pay the demands of the sick club at Haworth, in the county of York, in part of interest, and the remaining stock and interest to be paid on demand to the said *Timothy Bolton*, his executors, administrators or assigns. Witness my hand this 17th day of September, 1805. *Abraham Dugdale*, +.

"Witness to the above, *John Brown*, labourer."

"£30."

On the back of this instrument was the following indorsement:

"Received, 26th February, 1803, of Messrs. *Smithson and Co.* the sum of 5*l.* for marking the within instrument with a 1*l.* stamp.—Received for the Receiver General of stamp duties, *J. Young. Wm. Willes.*"

It was objected that this was a promissory note, and not an agreement. The learned judge, however, directed the jury to find a verdict for the plaintiff, but gave the defendant leave to move to enter a nonsuit.

*Knowles* now moved accordingly. The instrument was a promissory note, and not an agreement, and therefore was imperfectly stamped. No particular form of words is necessary to make a promissory note. That part of the instrument which precedes the promise to pay the demands of the sick club, certainly resembles a promissory note, and

that which follows cannot change the character of the instrument. Money is payable under it at all events. Had the money been demanded the day after the date, it must have been paid. The stipulation with regard to the payments to the sick club, merely points out to whom a portion of the interest was to be paid when due. [*Parke, J.* The amount to be paid to the sick club was uncertain.] At the time the promissory note was given the amount was ascertained.

1833.  
BOLTON  
v.  
DUODALE.

PARKE, J.—This is not a promissory note.

PATTESON, J.—I am of the same opinion. This resembles the case of *Leeds* and others v. *Lancashire* (a).

By the COURT,

Rule refused.

(a) 2 Campb. 205.

### THE APOTHECARIES' COMPANY v. ALLEN.

**DEBT** for penalties under the 55 Geo. 3, c. 194, s. 20. At the trial before *Denman, C. J.* at the last spring assizes for the county of Lincoln, it appeared that the defendant who was an illiterate person, and had been bound apprentice to a mason, had sold medicines, which he had mixed up of his own advice. The learned judge was of opinion that this was a practising as an apothecary within the meaning of the act, and the jury accordingly returned a verdict for the plaintiffs.

An unqualified person dispensing medicine of his own advice, is within the penalties of the Apothecaries' Act, 55 Geo. 3, c. 194.

*Balguy* now moved for a new trial. The supplying two or three persons with medicines which the party had mixed up himself is not practising as an apothecary. The duties

1838.  
  
 APOTHECARI-  
 ES'  
 COMPANY  
 v.  
 ALLEN.

of an apothecary<sup>(a)</sup> are defined in the 5th section of the act, where it is said, "Whereas it is the duty of every person using or exercising the art and mystery of an apothecary to prepare with exactness and to dispense such medicines as may be directed for the sick *by any physician lawfully licensed* to practise physic by the president and commonalty of the faculty of physic in London, or by either of the two Universities of Oxford or Cambridge."—The party in this case did not make up the prescriptions of any other person. It would also appear from the case of the *Apothecaries' Company v. Warburton* <sup>(b)</sup> that a party who did not make up prescriptions of physicians, was not a person practising as an apothecary, so as to be within the protection of the act, and if not within the protection he ought not to be liable to its penalties.

By the COURT.—The whole of the duties of an apothecary are not defined in the 85th section of the act. Were it so, any one might dispense any quantity of medicine of his own advice without being liable to penalties. The argument used in the case of the *Apothecaries' Company v. Warburton*, was, that a party, to be within the protection of the act, must have been *able*, before a certain time mentioned in the act, to mix up medicines prescribed by physicians. It does not by any means follow from that case that a party dispensing medicines according to prescriptions of his own is not within the penalties of the act. Dispensing most properly means a dispensing in pursuance of a man's own advice, as well as of the advice of a physician.

Rule refused.

(a) *Ante*, 404.

(b) 3 B. & Ald. 40.



1833.

BIRD, Clerk, v. RELFE and Wife.

**CASE** for dilapidation. The plaintiff was vicar of Ainstable, in the county of Cumberland; the defendant, *Jane Relfe*, was the executrix of the Rev. *William Smith*, the late vicar. The first count stated, that the vicarage-house and the outhouses, and the fences of the garden and glebe lands were out of repair and greatly dilapidated. Second count: that the vicarage house and the outhouses and the fences of the garden and certain lands lying in the county of Cumberland, were out of repair, and greatly dilapidated, ruinous, broken and in great decay, and that the lands were much wasted, destroyed and impoverished, and were wrongfully left by *Smith*, so wasted and impoverished at the time of his death. Third count: that the lands of and belonging to the vicarage were greatly impoverished, damaged and lessened in value by reason of the same lands having been used, managed and cultivated, during the life-time of *Smith*, and whilst he was vicar, in a bad and unhusbandlike manner, and contrary to the custom of the country where the same were situate, and were wrongfully left so impoverished, damaged and lessened in value by *Smith* at the time of his death. Fourth count: that at the time of the death of *Smith*, the lands of which he was seised in right of his vicarage were greatly impoverished, damaged and lessened in value by reason of the same having in the life-time of *Smith*, and whilst he was vicar, been managed, used, and cultivated in a bad and unhusbandlike manner, and that the same lands were wrongfully left by *Smith*, so impoverished, damaged and lessened in value at the time of his death. To all the counts but the first the defendants pleaded not guilty, and upon that count they allowed judgment to go by default. At the trial, at the Carlisle spring assizes, in 1833, before *Gurney, B.*, it appeared that the possessions of the vicarage consisted of ancient glebe land and of lands al-

Case, as for dilapidations, does not lie against the executors of a prior incumbent for mis-cultivation of the glebe land.

1833.

BIRD

v.

RELFE.

lotted in lieu of tithes under an inclosure act, passed in 1820. The jury assessed the damages upon the first count at 78*l.* 4*s.*, and found a verdict for the plaintiff, upon the second count, damages 100*l.* Upon the third and fourth counts a verdict was returned for the defendants under the direction of the learned judge, who was of opinion that the plaintiff could not recover for injury done to the land by overcropping and mismanagement; leave was however given to the plaintiff to move to enter a verdict for him on the third and fourth counts also, in case the Court should think that upon these counts an action would lie.

*Coltman* now moved accordingly, and that the amount of damage to be assessed might be referred to the decision of an arbitrator. The question as to the liability of a prior incumbent for overcropping the glebe land is now become of considerable importance, owing to the very general substitution of land for tithes. The land is as much the inheritance of the church as the parsonage house and buildings, and there appears to be no ground why the land should not be protected equally with the house. In *Liford's* case (a) it is said, "If a parson of a church and one *A.* are tenants in common of a wood, and *A.* endeavours to commit waste, the parson, for the preservation of the timber trees, shall have the prohibition against him that he shall not commit waste, and the reason thereof, as the chief justice said, was, that if the parson of a church will waste the inheritance of his church to his private use in felling trees, the patron may have a prohibition against him, for the parson is seised as in the right of his church, and his glebe is the dower of his church, for of it he was endowed." From this authority it appears, that a prohibition of waste lies of the parsonage land. Overcropping, it is true, does not amount to waste, but an incumbent may recover for dilapidations which do not nearly amount to waste. The incumbent of a living is required to take greater care of the patrimony of the church than an ordinary tenant for life of

(a) 11 Co. Rep. 49.

the inheritance of the reversioner. In *Wise v. Metcalfe* (a), *Bayley, J.* in delivering the judgment of the Court, said, that three rules had been proposed for the consideration of the Court, and that the second rule proposed was, that the rectory house and buildings were to be left as an outgoing lay tenant ought to leave his buildings, where he is under covenant to leave them in good and sufficient repair, order and condition; and added, "We are not prepared to say that any of these rules are precisely correct, though the second approaches the most nearly to that which we consider as the proper rule." In *Gibson's Codex* (b), in a note upon 13 *Eliz. c. 10*, it is said, "Although in this preamble nothing is referred to as Dilapidation, but decayed or ruined *buildings*, yet it is certain that under that name are comprehended *hedges, fences, &c.* in the like condition; and it hath been particularly adjudged concerning *wood and timber*, that the felling of them by any incumbent, (otherwise than for repairs or for fuel,) is *dilapidation*: from which he may be restrained by prohibition during his incumbencie; and for which he or his executors are liable to be prosecuted, after he ceases to be incumbent."

1839.  
BIRD  
v.  
RELFE.

DENMAN, C. J.—This is quite a new application. In order to make the executors of an incumbent liable to an action for dilapidations, something of demolition must be shewn: were an action of this description allowed, we should be exposing clergymen to vexatious actions respecting the cultivation and management of their land.

LITLEDALE, J.—I am of the same opinion: even actions between landlord and tenant, for the improper cultivation of land, have been but recently introduced.

PARKE, J.—Actions brought by the landlord against the tenant for the improper cultivation of the farm, are founded upon an implied contract between the landlord and tenant to cultivate the land according to the custom of the coun-

(a) 10 B. & C. 299.

(b) P. 752.

1833.

BIRD  
v.  
RELFE.

try. A contract cannot be implied between the former and the succeeding clergyman. No authority has been cited for the position. The liability of the incumbent is confined to the case of waste.

PATTESON, J.—We cannot extend this action beyond the decided cases. The action against the executors of the parson is altogether an anomalous action. The general rule is, that *actio personalis (a) moritur cum personâ*.

#### Rule refused.

(a) The *actio personalis* of the Roman lawyers, by whom this maxim was framed, was confined to wrongs done to the *person* of the plaintiff. From similarity of sound, however, the maxim has long been adopted as applicable to the *personal actions* of the common law of England, in which all actions are called *personal*, except those in which a *real* estate is sought to be recovered. As a *personal action*, in the common law meaning of that term, was always maintainable against the personal representative upon the *contracts* of the deceased, the maxim, as applied to English law, would require to be qualified by exceptions, comprising cases more numerous than those to which the rule can be applied.

#### MARY ANNE WILLIAMS v. CARWARDINE.

A reward offered by hand-bill to any person who shall disclose facts leading to a conviction for a felony, may be claimed by a person who, having notice of the handbill, makes the disclosure solely from motives of revenge against the felon.

**ASSUMPSIT** for 20*l.*, promised to the person who should disclose facts which should lead to the conviction of the murderers of *William Carwardine*. Plea, non assumpsit. At the trial before *J. Parke, J.* at the last spring assizes for the county of Hereford, the following facts appeared.

In the year 1831, the body of one *William Carwardine*, having been found floating in the river near the town of Hereford, a handbill was published by the defendant, in which he offered a reward of 20*l.* to any one who would disclose such facts as should lead to the conviction of the murderers. In the same year the plaintiff came forwards and gave information that a man named *Tigh*, and a woman called *Connor*, had murdered *William Carwardine*

in a brothel in the town of Hereford. *Tigh* and *Connor* were convicted of the murder principally upon the evidence of the plaintiff. It clearly appeared upon the trial of this cause, and was so found by the jury, that the plaintiff had given information of the murder not from any hope or expectation of receiving the reward offered in the advertisement, but from a feeling of revenge towards *Tigh* and *Connor*, with whom she had quarrelled. The jury, under the direction of the learned judge, found a verdict for the plaintiff, damages 20/.

1893.  
WILLIAMS  
v.  
CARWARDINE.

*Curwood* now moved for a rule nisi for a new trial. It distinctly appears that the contents of the handbill had no influence upon the mind of the plaintiff. This action is founded upon an implied contract (a). By the handbill, the defendant impliedly offers to contract with any one who will make a disclosure; but the disclosure must be made in consequence of the handbill; otherwise there is no consent by both parties to the contract, nor is there any consideration for the promise of the defendant. It is stated in the declaration that the plaintiff relied on the promise of the defendant; she did not rely on the promise, and therefore the consideration stated in the declaration was not proved. [*Denman*, C. J. Was there any doubt of the plaintiff's having notice of the handbill?] None; but the jury have found that the handbill did not operate upon the mind of the plaintiff, and did not induce her to make the disclosure.

By the COURT.—The plaintiff has complied with the condition of the contract stated in the handbill put forth by the defendant. We cannot enter into the motives of the plaintiff in making the disclosure.

Rule refused.

(a) As to the contract arising public in general, see *Phillips v. Bateman*, 16 East, 356.  
out of a handbill addressed to the



1833.

FREEMAN T. BIRCH.

The bailee of goods sending them by a carrier to the bailor, may sue the carrier for negligence.

**CASE** against a carrier for negligence. At the trial before *Patteson*, J., at the sittings for Middlesex in this term, the following facts appeared.

The plaintiff, a laundress residing at Hammersmith, was in the habit of sending linen to and from London by the defendant's cart, which travelled from Chiswick to London. A basket of linen belonging to *Spinks* was sent by the defendant's cart, and on its way to London part of the contents were either lost or stolen. *Spinks* did not pay the carriage of the linen. It was objected on the part of the defendant that the present action was misconceived, and that the action should have been brought by the owner of the linen. The learned judge over-ruled the objection, and a verdict was found for the plaintiff.

*Heaton* now moved for a new trial, on the ground of misdirection. The action should have been brought by the owner of the linen, and not by the laundress. It is laid down in *Schoyn's Nisi Prius* (a), that the action against a carrier for the non-delivery or loss of goods must be brought by the person in whom the right of property in the goods is vested. [*Parke*, J. The person who employs the carrier must bring the action.] The action against the carrier must be brought by the person in whom the legal right was vested, *Dawes v. Peck* (b). [*Parke*, J. The circumstance of the legal right being in one person may be evidence of employment by that person.] In *Dawes v. Peck* the action was brought by the vendor of the goods against the carrier; the vendee had named the carrier, and it was holden, that because the legal right to the goods had vested in the vendee, he should have brought the action. Again, in *Dutton v. Solomonson* (c) it was held, that where goods were ordered by a tradesman to be sent by a carrier, the delivery

(a) P. 405.

(c) 3 Bos. &amp; Pull. 584.

(b) 8 T. R. 330.

to the carrier vested the property in the purchaser, and he alone could maintain an action against the carrier for the loss of the goods; *King v. Meredith* (a). This action therefore is improperly brought.

1883.  
FREEMAN  
v.  
BIRCH.

LITLEDALE, J.—In the cases cited, the property in the goods was entirely gone out of the vendor. In this case the laundress retained a special property in the goods.

PARKE, J.—I am of the same opinion. In the case of vendor and vendee, if the goods are, whilst the carrier has the care of them, to be at the risk of the vendor, he must bring the action against the carrier. In ordinary cases the vendor employs the carrier as the agent of the vendee (b).

Rule refused.

(a) 2 Campb. 639.

2680; *Moore v. Wilson*, 1 T. R.

(b) See *Davis v. James*, 5 Burr. 659.

#### MARTIN v. KNOWLES.

**ASSUMPSIT** for goods sold and delivered. Plea: the general issue, and the statute of limitations. At the trial before Lord *Lyndhurst*, C. B. at the last spring assizes for the county of Kent, it appeared that the plaintiff, who was a shopkeeper, had been in the habit of furnishing a variety of goods to the defendant, from January 1823 to September 1828, amounting in the whole to 108*l.* 8*s.* 9*d.* In August, 1826, the account was balanced, and the defendant was found to be indebted to the plaintiff in 71*l.* 16*s.* This balance, it was agreed, should remain as a debt bearing interest, and a new account was commenced and continued till September 1828, during which latter period other goods to the amount of 36*l.* 12*s.* 9*d.* had been furnished. To take the first balance out of the statute of limitations, the plaintiff offered in evidence the following document signed by the defendant.

Held, that a stale debt, bearing interest, is not taken out of the statute of limitations by an engagement signed by the debtor to charge his estate with a sum corresponding in amount with the debt, with interest from the date of the engagement.

“ I do hereby charge my reversionary interest, when the

1833.

DOE  
v.

HARBROUGH.

*Roffey* was her heir as well as the heir of *Lazarus*. The will of *Sarah* should have been considered as evidence of the nature of her interest, as containing declarations of the manner of her holding. The will was quite as much entitled to weight as evidence of title, as the loose declarations which have been spoken to.

By the COURT.—Declarations are good as against a person, but not for him. The declarations proved in this case were admissions that the property belonged to *Roffey*: whereas by the will she claims the property to be her's in her own right. These declarations were well received in evidence. The case was one which it was quite proper should go to the consideration of the jury.

Rule refused.

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DOE dem. HAWTHORN v. MEE.

When a surrender of copyhold lands is made out of Court by a deed of surrender, the copy of court roll is still evidence of the surrender, although the act of 48 Geo. 3, c. 149, requires that in such cases the deed of surrender, or memorandum thereof, shall be stamped, and not the copy of court roll, as in all other cases.

It is no ground for departing from the rules of evidence, that by adhering to them the revenue may by possibility be injured.

**EJECTMENT** for a copyhold within the manor of Kettering, in the county of Northampton. At the trial at the Northamptonshire Lent assizes in 1833, before *Denman*, C. J., for the purpose of making out the title of *Hawthorn*, a stamped copy of a surrender of the premises from the father of the defendant to *Hawthorn*, as mortgagee, and a stamped copy of an admission of the latter, were produced in evidence. By the custom of the manor, a surrender may be taken out of Court by one of two persons styled deciners (*a*), it is then presented by the deciners at the following Court, inrolled, and left with the steward. It was objected on the part of the defendant, that the stamped copy of the surrender which had been made out of Court ought not to be received in evidence, but that the lessor of the plaintiff was bound to produce the original deed of surrender properly stamped. The learned judge directed the jury to find a verdict for the lessor of the plaintiff, but gave

(*a*) Decenners, tithing men.

the defendant leave to move to enter a nonsuit. A verdict was found for the plaintiff.

1833.

Doe

v.

Mxx.

*Miller* now moved to set aside the verdict, and enter a nonsuit. From *Coventry's* edition of *Watkins* on Copyholds (a), it appears that to make out a title to copyhold lands, the Court Rolls should be produced. It is there said, that in ejectment the rolls themselves must be produced, and show a surrender to the lessor of the plaintiff, and in general a subsequent admission to complete the title; *Rumney v. Eves* (b), *Doe v. Hellier* (c), *Peake's Evidence*, 456 (d). But assuming that in ordinary cases the copies of court rolls are evidence of the surrender and admittance, yet in this case the surrender having been made out of Court, the original deed of surrender ought to have been produced. By the 33d section of 48 Geo. 3, c. 149, it is enacted, that in all cases of surrender and admittance, the steward of the manor shall make out a copy of court roll of every such surrender and admittance, on vellum, parchment, or paper, duly stamped. The 31st section directs, that where any copyhold lands are intended to be conveyed by means of a surrender out of Court, the lord or steward of the manor shall not inrol any such surrender, or accept any presentment thereof, or admit any person to be tenant, unless such deed of surrender, or memorandum thereof, shall be duly stamped. From this it appears, that where the surrender is taken in Court, a stamped copy is to be prepared, but where the surrender is out of Court, there is no provision for stamping any copy. Therefore in cases where the surrender has been made out of Court, if the party were allowed to produce in evidence copies of court rolls, the revenue might be defrauded, inasmuch as there would not be the common security against evasions of the stamp laws. In the case of a surrender out of Court it appears that the original deed of surrender is copied upon the rolls, and a

(a) Vol. ii. p. 38, in the notes.

(c) 3 T. R. 162.

(b) 1 Leon. 100.

(d) 5th edition.

1833.

DOE  
v.  
MEE.

copy of the court rolls would thus be the copy of a copy. Now there is no instance in which Courts have admitted in evidence the copy of a copy of any document.

LITLEDALE, J.—I do not think that the provisions of the Stamp Act affect this case. That act has required that in one case the deed of surrender shall be stamped, in another that the stamp shall be upon the copy of the court roll; but this was a mere matter of convenient arrangement, the legislature thinking that the payment of the revenue would by this means be most effectually secured. This was not intended to alter the rules of evidence, and we cannot depart from those rules, because, by adhering to them in a particular case, there is a possibility that the revenue may be injured. This case falls within the general rule, that examined copies of the rolls of a Court are evidence.

PARKE, J.—I am of the same opinion. I do not think that there is any foundation for the distinction which has been taken.

PATTESON, J. concurred.

Rule refused.

The KING v. The JUSTICES of the West Riding of  
YORKSHIRE.

A notice of appeal under 55 Geo. 3, c. 68, against an order for the diversion of a highway, must show that the person intending to appeal is a party aggrieved by the order.

THE Reverend *Ralph Henry Brandling* was possessed of an estate at Middleton, near Leeds, in Yorkshire, across which there were three footpaths. These paths Mr. *Brandling* was desirous of diverting, and for that purpose caused three notices of his intention so to do to be given, pursuant to 55 Geo. 3, c. 68. On the 28th of May, 1832,

The grievance to the appellant is sufficiently shown by stating that he is obliged to use a more circuitous road.

The ten days' notice of appeal under the act must be computed one day inclusive and one day exclusive, and is not affected by a rule of the Court of Quarter Sessions, which requires ten days' notice of appeal, exclusive as well of the day of service as the first day of the sessions.

Mr. *Armitage* and Mr. *Ingham*, two of the magistrates of the West Riding of Yorkshire, met and viewed the paths and the purposed diversions, and having received evidence that the magistrates in the division or district had been summoned to attend the meeting, made three orders for the diversion of the footpaths. Mr. *Bower*, who was the proprietor of a farm over which the footpaths ran, being dissatisfied with the intended diversion, gave notice of appeal against the orders to the next general quarter sessions of the peace for the West Riding of Yorkshire. The notice of appeal was dated the 25th day of June, 1832, and after stating several grounds of appeal, proceeded in these words:

“ 12th. And because if the said order should stand, and the said road should be stopped, the said appellant and his tenants, occupiers of a certain farm, lands and houses, nearly adjoining to the said road, and who have heretofore used and have a right to use the same, and also other persons and the public, would be put to and sustain great inconvenience and delay.”


“ 13th. And would be compelled to travel to the places to which they have heretofore had occasion to travel and resort by the said road so proposed to be stopped by a circuitous road, and at a greater distance than they would have had to travel if the said road had continued open.”

On the 25th of June, 1832, a copy of this notice was served upon the surveyor of the township wherein the footpath was situate. The quarter sessions were held on the 5th of July.

At the sessions it was objected, on behalf of the respondent, in the first place, that the notice of appeal was defective in not stating that the appellant was injured or aggrieved; and secondly, that ten days' notice of appeal had not been given.

The respondent relied upon the following rule of the Court of Quarter Sessions:—“ In all cases of appeal, *not otherwise directed by law*, ten days' notice in writing shall be given by the party appealing, his, her, or their attorney

1833.

  
The KING

 v.  
The JUSTICES  
of the West  
Riding of  
YORKSHIRE.

1833.

*The King*  
v.  
*The Justices*  
of the West  
Riding of  
YORKSHIRE.

or solicitor, exclusive of the day of service, and the first day of the sessions, or the adjournment, to which the appeal is intended to be made." The Court overruled the first objection, but held the second objection, as to the service of the notice, fatal, and therefore dismissed the appeal. A dispute arose whether three notices of appeal had been given, or three appeals had been lodged with the clerk of the peace. The Court, at the conclusion, confirmed the three orders of the justices.

In Michaelmas term last, *Follett* obtained a rule, calling upon the justices of the West Riding of Yorkshire to shew cause why a writ of mandamus should not issue, commanding them to cause continuances to the then next general quarter sessions of the peace, to be holden for the said riding, to be entered upon the appeal of *Joshua Bower* against the said orders for diverting the said footpaths, and at the next general quarter sessions of the peace to hear and determine the merits of the said appeal.

From the affidavit filed on behalf of the appellant, when the rule nisi was obtained, it appeared that three notices of appeal had been given, and three appeals lodged with the clerk of the peace, but from the affidavit of the deputy clerk of the peace, made subsequently, it appeared that he had entered only one appeal. Against the rule nisi for a mandamus

*Blackburne* and *Dundas* now shewed cause.—The 55 Geo. 3, c. 68, s. 3, only authorizes the person or persons injured or aggrieved by the order to appeal. The case of *Rex v. The Justices of Essex*(a), shews that a party appealing should state in the notice of appeal, that he is a party injured or aggrieved. *Rex v. The Justices of Essex* was reviewed in *Rex v. Justices of West Riding of Yorkshire*(b). There, Lord *Tenterden* says, "The objection to the notice of appeal in this case was, that it did not allege that the parties appealing were aggrieved by the order, and in support of that objection, *Rex v. Justices of Essex* was relied

(a) 5 B. &amp; C. 431.

(b) 7 B. &amp; C. 678.

on. We have considered that decision, and if it had been founded on mistake, we should have been ready now to correct it. But after the best consideration, we think that if the question had now arisen for the first time, we should have been bound to decide that the party appealing against an order for stopping up a footway, must, on the face of his notice, shew that he is injured." *The King v. The Inhabitants of Blackawton* (a), is an authority to the same effect. The only part of the notice where the appellant says that he is injured is this, "the said appellant and his tenants, occupiers of a certain farm, lands and houses, nearly adjoining to the said road, and who have heretofore used and have a right to use the same, and also other persons and the public, would be put to and sustain great inconvenience and delay." The appellant has not thought proper to use the words of the act. He has done no more than was done in *The King v. The Justices of Yorkshire*. He has contented himself with stating his proximity to the road. The Court of Quarter Sessions therefore erred in supposing that this was a sufficient notice, and ought not to have proceeded further with the appeal.

The Court of Quarter Sessions was however justified in dismissing the appeal, upon the ground that due notice had not been given. By the third section of the Highway Act (b), ten days' notice of appeal must be given to the surveyor of the highways. The act does not say how these ten days' notices are to be computed, but leaves that to the sessions. By the rule and practice of the quarter sessions, the day of the service of the notice, and the first day of the sessions, are to be excluded from the computation. In *Rex v. Justices of Herefordshire* (c), where the question arose on the 49 Geo. 3, c. 68, s. 5, which required that ten clear days' notice of an appeal must be given, the Court held that the ten clear days' notice of appeal required by that statute were exclusive both of the day of serving the notice, and the day of holding the sessions. The notice in this case was served on the 25th of June,

1833.

*The King*  
v.

The JUSTICES  
of the West-  
Riding of  
YORKSHIRE.

(a) 10 B. & C. 792. (b) 55 Geo. 3, c. 68. (c) 3 B. & A. 581.



1833.

The KING  
v.  
The JUSTICES  
of the West  
Riding of  
YORKSHIRE.

and the sessions were holden on the 5th of July. Ten days' notice, therefore, according to the mode of computation pointed out by the order of sessions, was not given.

But one notice of appeal in this case was served, and one appeal only was entered.

*Follett*, in support of the rule.—As to the question that the party must in terms state that he is aggrieved.—[*Dennan*, C. J. We do not think that that is a valid objection to the notice.]

Then as to the mode of computing the ten days. The statute requires that ten days' notice of appeal shall be given, and the Court has laid down this rule in all cases in which a statute requires a number of days' notice, that one day is to be reckoned inclusive, and the other exclusive. In the new rules of court (*a*), that mode of computation is adopted. Where the legislature has required that ten *clear* (*b*) days' notice of appeal shall be given, it has been held that the day on which the notice is given shall be excluded. This point was much discussed in *Pellew v. The Hundred of Wouford* (*c*), and there the rule was laid down, that where the computation is to be made from an act to be done by the party, the day of doing the act shall be included. It is said that here the order of sessions regulates the mode of computation. That order does not apply to this case. Its operation is confined to cases "not otherwise directed by law." Here, the time is pointed out by the statute, and is therefore "otherwise directed." If any other construction be put upon the rule of the sessions, it will contravene the act of parliament. It is however probable that the magistrates proceeded upon their own rule, and not upon the act. When a case has been decided otherwise than upon the merits, on account of some formal objection to the notice, this Court, in the exercise of a visitatorial power over the Court of Quarter Sessions, will interfere, and see that sub-

(a) *Ante*.

(b) *Ante*.

(c) 4 M. & Ryl. 130; 9 B. & C. 134.

stantial justice is done; *Rex v. Justices of Wiltshire* (a). In the case of *The King v. Justices of Lancashire* (b), Lord Tenterden says, "The justices certainly have a discretionary power to make rules for the governance of the practice of the sessions, but the case cited (c) shews that this Court, for the purposes of justice, will interfere to controul that discretion." Upon the authority of *Rex v. Justices of Wiltshire*, the Court will send a mandamus in this case, as justice has not been done. The object which the parties had in view was to try whether or not they were aggrieved, and they have been met by a preliminary objection to the notice.

It is said that but one notice of appeal was given, and that one appeal only was entered. It is sworn that three notices were given, and three appeals were lodged. The clerk of the peace thought one sufficient, and entered it. The magistrates put the party to his election, which shews they thought they were in possession of all three.

DENMAN, C. J.—It appears to me that this rule must be made absolute. The circumstance of the appeals against the orders No. 1 and 3 not being entered, is satisfactorily explained by the decision of the Court of Quarter Sessions with respect to the order No. 2. It is also expressly sworn, that the appellant's attorney tendered three appeals to the deputy clerk of the peace. The rule of the Court of Quarter Sessions appears to me wholly inapplicable. That rule provides for cases not otherwise directed by law. This case is provided for by law. By the act of parliament, ten days' notice of appeal is to be given. The same rule must prevail in computing these ten days as in other cases, one day must be reckoned inclusively and the other exclusively. The effect of this mode of computation is, that the notice here given was sufficient. If the Court of Quarter Sessions were not acting upon their own rule, but, by the decision they have pronounced, intended to put a construction upon the act of parliament, they have construed it erroneously.

(a) 10 East, 404. (b) 7 B. & C. 691. (c) *Rex v. Wiltshire*.

1833.

  
The KING  
v.

The JUSTICES  
of the West  
Riding of  
YORKSHIRE.

1833.  
  
 The KING  
 v.  
 The JUSTICES  
 of the West  
 Riding of  
 YORKSHIRE.

I think, however, that the Court of Sessions were right in over-ruling the objection, that the party had not in the notice stated in terms that he was a party aggrieved.

LITLEDALE, J.—The rule of sessions only applies to those cases where no time for giving notice of appeal is fixed by law. The 14 *Geo. 2*, c. 17, s. 4, requires, in certain cases, that at least ten days' notice of trial shall be given. In construing that statute, the day on which the notice is given is excluded, and the day on which the trial is to be had is included in the computation. A similar construction must be put upon the 55 *Geo. 3*, c. 68, s. 3, which requires ten days' notice of appeal. As to the objection to the notice, that it was not stated in the notice that the party was aggrieved, it appears to me that it sufficiently appeared that the appellant was a party aggrieved or injured.

PARKE, J.—I am of opinion also that this rule should be made absolute. The order of sessions is only applicable to those cases where no time is fixed by law, and where the magistrates have a discretion. The question here is, what is the meaning of the ten days' notices required by the statute? The same rule of construction must prevail in this case, as has been adopted by the Court with respect to the statute requiring ten days' notice of trial. One day must be reckoned inclusive, and the other exclusive. Had the legislature intended that both days should be excluded from the computation, they would have required ten *clear* days' notice of appeal. I am by no means satisfied that it was the fault of the deputy clerk of the peace that all the appeals were not entered.

Rule absolute.

1833.

HINE v. ALLELY and another.

**ASSUMPSIT** on a bill of exchange by the indorsee against the drawers. Plea, general issue. The declaration set out a bill of exchange, dated the 15th May, 1830, drawn by the defendants upon one *Peter Perry*, No. 6, Budge Row, for the sum of 10*l.* 12*s.*, payable three months after date to the defendant's order, and averred that the bill was accepted by *Peter Perry*, indorsed by the defendants to the plaintiff, and was presented and shewn to the said *Peter Perry* for payment thereof, but that *Perry* would not pay the bill. At the trial of this cause before *Parke, J.* at the sittings at Westminster after Hilary term last, it was proved, that on the 18th August, 1830, the plaintiff went to the house, No. 6, Budge Row, Watling Street, where the acceptor had resided, for the purpose of presenting the bill to him for payment, but at that time the house was shut up, and *Perry* had apparently left his residence, and could not be heard of in the neighbourhood. Upon this it was objected, that the allegation in the declaration, that the bill had been presented and shewn to *Perry*, the acceptor, for payment, was not proved. The learned judge overruled the objection, and a verdict was found for the plaintiff for 11*l.* Leave was however given to the defendants to move to set aside the verdict and enter a nonsuit.

A holder of a bill carried it, when due, to the residence of the acceptor stated in the bill, found the house closed, and inquired for the acceptor in the neighbourhood, but could not hear of him: Held, that the bill was dishonoured.

*Erle* now moved for a rule nisi to set aside the verdict and enter a nonsuit. The allegation of the presentment to the acceptor was not proved. It was not a sufficient presentment that the bill was taken to the house where the acceptor had once resided, when the house was closed and the acceptor no longer lived there. In *Hardy v. Woodrooffe* (a) a promissory note was made payable at Guildford; the plaintiff presented it at two banking houses at Guildford, the defendant then living in London; and this was

(a) 2 Stark. 319.

1833.

HINE

v.

ALLELY.

held to be a presentment to the acceptor. But that case is distinguishable from this. In that case, as the bill was accepted generally at Guildford, and the defendant did not live there, the banking houses were the only places where it was probable that the acceptor had funds. In this case, the plaintiff, when he found the house shut up, did not make further search. It is true that the case of *Burbridge v. Manners* (a) has decided, that as soon as the acceptor refuses to pay the bill on the day on which it becomes due, it is dishonoured; but in this case the bill was not presented in such a way so that payment could be refused.

PARKE, J.—The bill was dishonoured as soon as the indorsee went to the house at which it was made payable and found it closed.

By the COURT (b),

Rule refused.

(a) 3 Camp. 193.

(b) *Denman, C.J., Littledale, J., and Parke, J.*

### PHILLIPS v. WOOD.

Where it was agreed between *A.* and *B.* that *B.* should take *A.*'s mare to graze and have her blistered: Held, that *A.* could maintain an action against a chemist for selling ointment to *B.* which, upon being applied, injured the mare.

CASE. The first count in the declaration stated, that the defendant was a chemist and druggist, and agreed to sell the plaintiff a quantity of ointment reasonably fit to be applied as a blister to horses with puffed legs, and that it was the duty of the defendant to sell ointment reasonably fit to be so applied; nevertheless the defendant sold to the plaintiff ointment totally unfit for that purpose. By means whereof the plaintiff having applied some portion to the legs of his mare, they were much injured, and the mare became useless. Plea, general issue. At the trial before *Littledale, J.*, at the Somerset spring assizes 1833, it appeared that the plaintiff, thinking his mare required blister-

ing, agreed with his father that the latter should take her, have her blistered and properly treated, and send her to grass in his own field. The father was to be paid for the keep of the mare. The father in consequence applied to the defendant for some blistering ointment, which was furnished to him. This ointment was applied, by a person employed by the father, to all four legs at once, which was described as a severe and dangerous course. In the result an injury was occasioned to the legs of the mare, which rendered her wholly unfit for use. The jury found a verdict for the plaintiff, damages 32*l*.

1833.  
  
 PHILLIPS  
 v.  
 WOOD.

*Bompas*, Serjt., now moved for a new trial, upon two grounds. First, the contract was not properly set out in the declaration; and secondly, the plaintiff himself was guilty of negligence. The contract proved was made with the father and not with the son, and therefore there is a variance between the declaration and the evidence; *Lopez v. De Tastet* (a). It was said that the ointment was too strong. It was, however, applied to all the four legs of the horse, which was an improper treatment. The plaintiff's agent was therefore guilty of negligence; and before a party can charge another with negligence, he must shew himself to be quite free from the charge of having, by his own improper conduct, contributed to produce the injury complained of.

PARKE, J.—It appears to me that there ought to be no rule in this case. With respect to the variance between the declaration and the evidence, it is an established rule, that a contract must be described according to its legal effect. It is quite clear that in law this contract was the contract of the son. By the terms of the agreement between the father and the son, the latter was liable for the price; and if the transaction had been upon credit the chemist might have recovered from the son, for the

(a) 1 Brod. & Bingh. 538.

1833.  
 PHILLIPS  
 v.  
 WOOD.

father purchased in the character of agent to the son. Upon the second point, my brother *Littledale* left it to the jury to say whether or not the plaintiff had been guilty of negligence, and the jury found that he had not. I however by no means assent to the proposition, that the plaintiff is bound to shew that he himself is not chargeable with negligence before he can impute it to the defendant. That forms no part of the issue which the plaintiff is bound to prove.

PATTESON, J.—Though this is in form an action of tort, it is in fact an action upon the contract. The father acted in this case as the agent of the son, and therefore the contract is properly described as a contract with the son. Upon the second question, it has already been stated by my brother *Parke*, that the learned judge left it to the jury to say whether the plaintiff had been guilty of negligence.

LITTLEDALE, J. concurred.

Rule refused.

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STEARNS v. MILLS and ELIZABETH WRIGHT, Executor  
 and Executrix of WRIGHT.

Upon *plene administravit* pleaded, the executor is not concluded by the amount of assets in the inventory exhibited to the ecclesiastical officer.

Whether such inventory is *prima facie* evidence of assets, *quære*.

It is not suf-

ficient to charge an executor with assets, to show that he has acquiesced in the receipt of assets by his co-executor.

DEBT by the obligee of a bond against the executor and executrix of the obligor. *Mills* pleaded *plene administravit*; the other defendant suffered judgment by default. At the trial before *Gurney*, B., at the Suffolk Lent assizes 1832, the following facts appeared.

The testator occupied a farm, upon which at the time of his death was certain farming stock belonging to him. In June, 1826, the testator made his will, and appointed his wife and the defendants, his executrices and executor. Testator by his will desired that his effects might be valued

by his executors, and bequeathed, after payment of debts and legacies, the remainder of his stock and crop and effects to his wife for life. He also desired that his wife might remain in possession of his farm to the end of his term, or so long as she might wish.

The will was proved by both the defendants. The widow continued in the occupation of the farm, and disposed of the stock upon it. *Mills* resided ten miles from the farm, but occasionally visited it. To shew that *Mills* had assets, evidence was given that at the time when the will was proved, an inventory of the testator's stock and effects had been made out; this inventory was not signed by either of the defendants, but was delivered by *Elizabeth Wright*, in the presence of *Mills*, to the ecclesiastical officer before whom the will was proved, and was tacitly assented to by *Mills*. But it was admitted that no part of the testator's effects had ever actually passed into the hands of *Mills*. The learned judge being of opinion that the evidence offered was sufficient to show that there were assets in the hands of *Mills*, directed the jury to find a verdict for the plaintiff, but gave the defendant leave to move to enter a nonsuit. In Easter term last a rule nisi was accordingly moved for and obtained by *Storkes*, Serjt.; against which,

*Biggs Andrews* and *Austin* now shewed cause. It is the duty of the executors to exhibit an inventory at the time they take out probate, and by the ecclesiastical law they are protected from any liability beyond the value of the effects stated in the inventory, unless it be proved by the party claiming, that further assets have come to their hands. It is stated in *Burn's Eccl. Law*, (a) that it is the duty of every executor and administrator, at the time of the grant of probate or administration, to produce an inventory of the goods, chattels, and credits of the deceased; that in general an executor who intermeddles with the

(a) In the 6th edition, vol. 4, p. 294, title Wills.



1833.

STEARN  
v.  
MILLS.

administration of the effects of the deceased, without making an inventory, shall be bound to answer every creditor his whole debt, and to every legatee his whole legacy, for in such case the law presumes that the effects are sufficient; otherwise, the executor is presumed to have no more goods of the testator's than are described in the inventory, therefore any claimant who affirms that the testator left further assets, must prove it. The executors therefore derive considerable benefit from the exhibiting an inventory, as they thereby discharge themselves from the payment of debts. [*Parke, J.* It is not the practice to exhibit an inventory. In the new edition to *Burn's Ecclesiastical Law* (a), there is a note upon this point.] In vol. 4, p. 310 of the same work, it is said, that although such inventory is not required by law to be made, yet if it be made upon fair appraisement, and exhibited before the judge who proves the will upon the oath of the executor, such inventory shall receive credit in all causes and Courts, and he that exhibits the same be freed from the burthen of proving that the deceased had no more goods. In *Toller on Executors* (b) there are observations to the same effect. In *Orr v. Kaives* (c), which was a bill for satisfaction of a legacy out of the assets against the representatives of an executor who had not exhibited an inventory, to be paid the whole of the legacies, Sir *John Strange* says, "Not exhibiting an inventory which every executor ought, especially in a deficient estate, is an imputation upon him. Whereas no laches can in this case be imputed to the plaintiff in not calling on him. This, though not conclusive evidence, always inclines the Court to bear harder on an executor, because he may at any time relieve himself by an inventory, if he finds the estate deficient." It must have been on this principle that the case of *Parsons v. Hancock* (d) was decided. That was an action of debt against three executors,

(a) Vol. 4, p. 293, note (3).

(b) P. 247.

(c) 2 Vesey, sen. 194.

(d) 1 Moody &amp; M. 330.

they pleaded *plene administraverunt*. The plaintiff produced, as evidence of assets, an inventory of the goods of the testator signed by two of the defendants. *Parke, J.* there says, "I think the defendant who did not sign the inventory, is entitled to a verdict. The substance of the plea, as far as she is concerned, is, that she administered all that ever came to her hands for that purpose, and there is no evidence that any ever did so. I think the plaintiff can only have his verdict against the two who signed the inventory." In the present case the delivery by the one executor, and the assent of the other, are much stronger evidence than the mere signing of the inventory. [*Parke, J.* In *Parsons v. Hancock*, the inventory had not, I believe, been delivered previously to the probate of the will.] The inventory in this case would have been sufficient to protect *Mills*, and it must also have its usual weight as evidence that the effects mentioned in it came to his hands. In *Buller's N. P.* 142, b. there is the following case of *Ayliff v. Ayliff*. The sheriff to a *sci. fa.* having returned that the defendant and the executor had wasted, he appeared at the return of the writ and *plene administravit*, and traversed the wasting. On issue thereon, the inventory exhibited by the defendant at the Ecclesiastical Court was allowed to be evidence sufficient to put the executor to shew how he had disposed of the goods and money mentioned therein (a). In *Foster v. Blakelock* (b), the probate granted to the defendant was held sufficient presumptive evidence of assets in his hands to the amount covered by the stamp. But the case does not rest solely upon the circumstance of the delivery of the inventory. *Mills* was bound to see to the proper administration of the testator's property, inasmuch as he permitted the other defendant to take and continue in possession of it. He connived at the use of the goods by her, and he is therefore liable on her *devastavit*. In

1883.  
  
 STEARN  
 v.  
 MILLS.

(a) See 2 Starkie on Evidence, 322, 2 ed.; and *Giles v. Dyson*, 1 Starkie, 32. (b) 8 D. & R. 48, S. C. 5 B. & C. 828.

1833.

STEARNS  
v.  
MILLS.

*Churchill v. Hopson* (a), it is said "If there be two executors, and they join in the receipt, and one only receives the money, as to creditors who would have the utmost benefit of law, each is liable for the whole, though one executor alone might give a discharge and the joining of the other was unnecessary." In the case of *Sadler v. Hobbs* (b), which was a bill against executors, the Lord Chancellor says, "I take it to be clear that where by any act or any agreement of the one party money gets into the hands of his companion, whether a co-trustee or co-executor, they shall both be answerable." *Cross v. Smith* (c) fully supports the decision in *Sadler v. Hobbs*. [Parke, J. There the executor had actually received the money, and had allowed it to pass into his co-executor's hands.] The principle in this case is the same. The executor knew that the farming stock was the property of the executors, and he saw the executrix employing them, but not using them for the purposes to which they ought to have been applied. The receipt by her under such circumstances must be considered as a receipt by him.

*Stokes*, Serjt., and *Kelly*, in support of the rule. The jury at the trial negated the supposition that *Mills* ever exercised any authority over the goods while in the possession of the widow. *Mills* never did interfere at all, and it was proved that no assets had come to his hands. The whole question at the trial came to this one point, whether or not the joint exhibiting of the inventory is of itself sufficient evidence of assets having come to the hands of *Mills*. In all the cases which have been cited it is assumed that assets had come to the executor's hands. In *Cross v. Smith* assets had come to the executor's hands, and he had allowed them to pass to the other executor. It is apprehended that the broad principle is laid down in *Irving v. Peters* (d), where it is said, when a defendant pleads *plene administra-*

(a) 1 Salkeld, 318.

(c) 7 East, 246.

(b) 2 Brown's Ch. Cases, 116.

(d) 3 T. R. 688.

*vit*, it must be admitted now that he is only answerable to the amount of the assets proved. This brings it back to the question whether the exhibiting of the inventory is sufficient proof of a receipt of the assets by *Mills*. It is submitted that it is not so, and that if it affords a *prima facie* presumption of assets, that presumption is fully rebutted by the proof in this case, that no assets ever in fact came to the executor's hands.

DENMAN, C. J.—It appears to me that the exhibiting of the inventory is no proof of assets in the hands of *Mills*; nor can the evidence of his going to make a statement of the testator's effects in reason affect him with the receipt of assets. The inventories mentioned in some of the cases cited are inventories of what the executor had actually received, and not, as in this case, a mere statement of the amount of the testator's effects. *Mills* has accounted for all the assets which have ever come to his hands. The going upon the farm does not, I think, at all vary the case; and it was taken for granted upon the trial that he had not further interfered. The form of the rule which has been obtained in this case is for a nonsuit, and I am of opinion that this rule must be made absolute.

LITLEDALE, J.—I am entirely of the same opinion, without considering whether the inventory would be evidence or not in any case. If it clearly appears, as here, that no assets have ever come into the executor's hands, the inventory is no evidence to the contrary. Suppose the case of executors living in London, whose testator had effects in Yorkshire and in Cornwall; if it be necessary that an inventory should be made out before probate, and such inventory is to be evidence of assets, the executors must go into Yorkshire and Cornwall to take possession of and value the effects, before obtaining probate. Or, suppose a testator has goods in the hands of a factor, who becomes insolvent subsequently to the testator's death, are

1833.

STEARN

v.

MILLS.

1853.  
STEARN  
v.  
MILLS.

the executors to be liable to the extent of the value of the goods? The onus probandi ought to lie on the persons who affirm that the executors have assets. I do not accede to the doctrine laid down in *Foster v. Blakelock*. The question does not appear to have been fully brought before the Court. I perceive that I did not participate in the decision.

PARKE, J.—I am clearly of the same opinion. In the first place, it is to be considered what is the effect of the inventory; and secondly, whether, in the equivocal circumstances under which this inventory was presented, it is to be considered as the inventory of both. Assuming that it was exhibited by both, it is merely an inventory of the articles belonging to the testator. I will not decide whether or not this would be *prima facie* evidence; but supposing that it is such, it is capable of being rebutted by proof that the executor actually never did receive the articles mentioned in it. It called upon the defendant for an answer, and that answer has been given. To say that when both executors go before the archdeacon and exhibit an inventory, that they shall both be liable to assets to the amount stated in the inventory, is what no case has as yet decided. No one can doubt the propriety of the decision in *Cross v. Smith*. In that case one executor had actually received the goods of the testator, and had intrusted them to his co-executor. He was bound, therefore, to look to the administration of the testator's effects. But to say that one executor shall be bound conclusively by the act of the other, is going beyond what any case has as yet decided. The case of *Foster v. Blakelock* did not undergo much discussion. An executor is not answerable to the amount of assets covered by the stamp on the probate, as he includes all debts in the amount upon which the duty is paid. The executor is certainly not responsible to creditors for any debts beyond the amount of assets which he has actually received.

Rule absolute.

1833.

## ROBERTS v. DAVEY.

**TRESPASS**, for entering certain lands of the plaintiff, called Carvannell, in the parish of Gwennap, in the county of Cornwall; another close, in the same parish, called Longcroft; and another close in the same county; and sinking pits in the said closes, and carrying away ore. The declaration also contained a count *de bonis asportatis*. Plea, first, not guilty: Secondly, *liberum tenementum*: and thirdly, a special plea to this effect, that in 1821, one *Stephen Easticke* was seised in fee of a third part of the lands in which &c. and by an indenture between *Easticke* of the one part, and *John Bullock* of the other part, *Easticke* granted to *J. Bullock*, his executors, administrators and assigns, full and free liberty, licence and authority to dig, work, mine and search for tin, tin ore, copper, copper ore, lead, lead ore, and all other ores, metals or minerals, within, upon, through, out and under one third part undivided in the lands in which &c., with liberty to erect all engines and other buildings as might be useful and convenient to *J. Bullock*, his executors, administrators, co-adventurers and assigns, in the exercise of such liberties, licences, powers and authorities, and also to divert all watercourses, and also to dig any new leet for the conveying of any water, habendum for 21 years. Before the expiration of this term, on the 23d November, 1827, that *J. Bullock* made his will, and appointed *Betsy Lovell Bullock* his executrix and died. That *B. L. Bullock* took upon herself the execution of the will, and was thereby legally entitled to the use, exercise and enjoyment of the liberty, licence and authority so granted by the said indenture. And that because *B. L. Bullock* could not enjoy the liberties so granted, the defendant as her servant entered &c. Issue was joined upon the first plea. To the second plea, the plaintiff newly assigned. And to the third plea, plaintiff replied, that the liberties, licence and

*A.* grants to *B.* a licence to enter upon his lands to search and dig for ores for a term of 21 years, with a proviso that if *B.* cease to work the mines for six months, or break any other of the covenants contained in the licence, then the "supposed indenture, and the liberties, licences, powers and authorities thereby granted shall cease, determine, and be utterly void and of no effect:—Held, that the word 'void' was to be construed to mean voidable, and that some act of *A.* to show his election to enforce the forfeiture is necessary to put an end to the licence.

1833.  
 ROBERTS  
 v.  
 DAVEY.


authority mentioned in the third plea, were granted, subject to and under a condition, that if *J. Bullock*, his executors, administrators or assigns, should at any time or times neglect effectually to work the said premises, for any time or times exceeding in the whole six calendar months in any one year of the term, or should not work effectually such mine or mines, and the veins and lodes discovered or to be discovered within the premises, unless hindered by extremity of water or other unavoidable accident, or should fail in the performance of any of the covenants, conditions and agreements, affirmative or negative, in the said indenture contained, then that the supposed indenture, and the liberties, licences, powers and authorities thereby granted, and every of them, should cease, determine, and be utterly void and of no effect. The replication then averred, that *J. Bullock* in his lifetime had neglected to work the said premises, not having been hindered by extremity of water or other unavoidable accident, and that neither *J. Bullock* in his lifetime, nor *B. L. Bullock* since his decease, had performed the said condition. The replication also newly assigned more force than was necessary for enjoying the said liberty. The defendant by his rejoinder took issue on the first, and confessed the second new assignment, and demurred generally to the replication as to the last plea. Joinder in demurrer.

*Follett* in support of the demurrer.

PARKE, J.—The whole question turns upon the meaning of the word ‘void.’ In order to know whether void means absolutely void, or void upon the election of the lessor, or voidable by entry, it is necessary to look at the whole context of the deed. This we cannot do upon these pleadings, the deed not being entirely set out.

*Follett*. It is the ordinary mining lease of the county of Cornwall. It seems quite clear that it is a reservation

for the benefit of the landlord, and it is a proviso for re-entry in case of not working the mine.

1833.  
  
 ROBERTS  
 v.  
 DAVEY.

The Court intimating an opinion that they could not give judgment without seeing the whole of the deed, it was agreed by the parties that the deed should be considered as entirely set out in the pleadings, the record to be amended accordingly. The lease or licence was in the usual form (a), and reserved a royalty rent.

*Follett.* The question simply is, whether the lease is absolutely void immediately upon the non-performance of the condition, or void only upon the lessor's doing some act to shew his election to take advantage of the forfeiture. There is no doubt that, under the facts stated, the lease might have been put an end to, but if nothing has been done, the lease continues in force. The construction of the lease upon this point, is the same as that in *Doe v. Bancks* (b). In that case the plaintiff had granted to the defendant a lease of certain mines, and the proviso was, that if the defendant should stop or cease working at any time for two years, the lease should be deemed void to all intents and purposes. The Court held the lease voidable, and *Abbott*, C. J. there says, "Notwithstanding the language of this lease it did not become absolutely void by a cessor of two years, unless the landlord thought fit to make it so." In *Arnsby v. Woodward* (c), there was an agreement for a lease, with a proviso that if the rent should be in arrear 21 days after demand made, or if any of the covenants should be broken, then the term thereby granted, or so much thereof as should be then to accrue and unexpired, should cease, determine, and be utterly void, and it should be lawful for the landlord to re-enter. Lord *Tenterden*, C. J. said, "Taking the two clauses of the proviso

(a) *Vide Doe v. Wood*, 2 B. & Ald. 724; *Rowe v. Brenton*, 3 M. & Ryl. 133.

(b) 4 B. & Ald. 401.

(c) 6 B. & C. 519.



1833.  
 ROBERTS  
 v.  
 DAVEY.

together, the sound construction of them gives to the landlord a right to re-enter, to be exercised or not at his election;" otherwise the latter clause, "it shall be lawful to re-enter," would have no effect. *Littledale, J.* says, "In this case the lease was not void, but voidable, and the landlord was bound to re-enter in order to take advantage of the forfeiture, as in the case of freehold interests." In *Ride v. Farr (a)*, the proviso in the lease was, "that if the rent should be unpaid 30 days next after the day or time when the same was reserved, then the demise, and every article, clause and thing therein contained, should cease, determine, and be utterly void; and Lord *Ellenborough* there says, "It would be contrary to a universal principle of law, that a party shall never take advantage of his own wrong, if we were to hold that a lease which in terms is a lease for 12 years, should be a lease determinable at the will and pleasure of the lessee, and that a lessee by not paying his rent should be at liberty to say that the lease was void; and on this principle, even if it were not borne out so strongly as it is by the consent of authorities, it would be sufficient to hold that the lease was only void as against the lessee, not against the lessor." From these cases it appears that the distinction between freeholds and terms for years as to necessity of an entry, to determine the interest, no longer exists (*b*), that it is equally necessary in the one case as in the other, and that the lease is in truth not void, but determinable at the election of the landlord. It does not appear upon the pleadings in this case, that the lessor has done any act declaratory of his option to determine the lease, and it is not for the plaintiff, who so far as appears upon the pleadings is a stranger both to the grantor and grantee, to say that the lease or licence is determined.

(a) 6 M. & S. 121.

(b) There is still this difference, that to determine a freehold interest, there must be an actual entry or something tantamount, even where the estate is declared to be

void on non-performance of the condition; but in the case of a chattel, any thing shewing the intention of the party to insist upon the forfeiture is sufficient.

*Jeremy*, contra. This is a mere licence to enter for the purpose of searching for minerals, and passes no interest in the land. In *Doe v. Wood* (a) a deed similar to this, except that the words in the operative part were more applicable to a lease than the expressions in the premises of the present deed are, was held to be a mere licence, and not a lease. That case is also an authority to shew that a very slight act done by the grantor is evidence of an intention on his part to determine the licence. The next question which arises is, whether this licence is void or voidable, and whether any entry is necessary on the part of the grantor. It is important to consider what was the consideration for the licence. The condition attached to the grant of the licence was a condition precedent, and the performance of that condition was the consideration which induced the grantor to grant the licence. Unless, therefore, *J. Bullock* worked the mine, which was the condition of the grant, he had no interest in the land. It is laid down in a note to the case of *Pordage v. Cole* (b), that where mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred before the one covenanting party can bring an action against the other. *Arnsby v. Woodward* is totally different from the present, both in the language of the proviso and also in the facts. There was in that case a clause of re-entry which was held by the Court to override the whole proviso, and thus it became necessary for the landlord to re-enter. The landlord had also in that case received rent from his tenant after the time of his forfeiture, and thus he had acknowledged a subsisting tenancy. In the case of *Doe v. Bancks*, the tenant was endeavouring to take advantage of his own wrongful act, and to reduce a lease for years to a tenancy from year to year. In *Ride v. Farr* the landlord had received rent after the happening of the forfeiture. At the time of granting the licence the grantor was in possession, and continued so

1833.  
  
 ROBERTS  
 v.  
 DAVEY.

(a) 2 B. & Ald. 724.

(b) 1 Saunders, 319 h.

1833.  
  
 ROBERTS  
 v.  
 DAVEY.

afterwards ; therefore there could be no occasion for a re-entry. [*Parke, J.* It still comes to the original question whether the grantor is not obliged to do *some* act before the licence becomes absolutely void.] It lies upon them to say that no act has been done on the part of the grantor to shew his acceptance of the forfeiture. [*Parke, J.* It is for you to shew that you have done something, if the meaning of the word 'void' is merely void upon the election of the grantor.] The grantor has allowed another person to come into possession : it must be presumed, that a party who is in possession is seised, and if the grantor has given the plaintiff seisin, he has not given him an estate sub modo. [*Parke, J.* It does not appear that he has given him an unqualified estate. It comes to the simple question whether or not the licence is absolutely void.] The licensee has totally failed in the performance of that which is the whole consideration of the licence. In *Fenn v. Smart (a)*, *Bayley, J.* says, "If the estate be granted upon condition that if the grantee do such an act, the estate shall thereupon immediately cease and determine, then no entry is necessary." The distinction is, that where the performance lies in the lessee, the non-performance makes the lease void as to him. Here the licence has never been exercised, it not being alleged that the licensee ever entered.

DENMAN, C. J.—There is nothing in the pleadings to connect *Easticke* with the plaintiff. Therefore it appears to me that the question as to whether the grantor ought, under the terms of this proviso, to do any thing to shew his intention to accept the forfeiture does not arise. But supposing that the question did arise, it appears to me to be quite clear, upon the authority of the case of *Doe v. Bancks*, that he must do some act to shew his determination, and that until he does so the licence continues in force.

LITLEDAL, J.—I am of opinion that this replication cannot be supported. In the case of *Doe v. Bancks*,

(a) 12 East, 448, in arg.

supposing this to have been a lease of the mines, it would have been necessary to prove some re-entry or act of the laudlord. Although I admit that this is not the case of a lease of the land, but is a mere licence or authority, I think the grantor, or party claiming under him, should have done something. Upon the analogy of this case to the case of a lease, I think it was for *Easticke* to give some notice that he had put an end to the licence, and that until that was done the licence continued. It has been argued that the possession of the plaintiff is like a re-entry, but that does not at all appear upon the pleadings. It is not shewn that the plaintiff comes in under the lessor, and he may be a perfect stranger.

1833.  
  
 ROBERTS  
 v.  
 DAVEY.

PARKE, J.—I am also of opinion that the replication cannot be supported. The only question is, whether the word ‘void’ means voidable, or absolutely void. If it is voidable, it must be so either by re-entry or by the grantor making his election. As, however, there is no statement in the case of any act shewing the election, nor of any re-entry, it is not necessary for us to decide which of the two it means. The case of *Doe v. Banks* applies to this case; it is quite clear that this licence is not absolutely void upon non-performance, but only to be avoided upon some act done by the licencer. There must be something to shew that *Stephen Easticke*, or some one under him, made his election to accept the forfeiture.

Judgment for the defendant.

MEAGER v. SMITH.

ASSUMPSIT for work and labour done and goods sold and delivered, and upon the common money counts. Plea, general issue. The defendant had paid 10*l.* into Court *Semble*, that payment of money into Court upon an indebitatus count for work and labour, where there has been but one transaction between the parties, admits the authority of the agent by whom the work was ordered, and that payment of money into Court on a count which states a special contract admits that contract; but payment generally, on the indebitatus counts, does not admit the causes of action, notwithstanding the late rule of Court, which directs the particulars to be annexed to the record.

1893.  
MEAGER  
v.  
SMITH.

generally. At the trial before *Bolland*, B. at the Glamorganshire spring assizes, 1892, the following facts appeared. Messrs. *Gautier* and *Dubois* were merchants at Brest, and owned a schooner called the *Auguste Virginie*, which on the 3d May, 1891, was damaged while proceeding down the Swansea river. The defendant was the correspondent of the owners, and one *Mills* was the defendant's colliery agent. *Mills* directed the plaintiff, who is a ship-builder, to make a survey of the ship, and to state to him what sum would put her into repair. The plaintiff stated that the expense would be between 70*l.* and 80*l.* *Mills* then ordered that what was necessary should be done. *Mills* visited the vessel once a week whilst she was under repair, and upon one of those occasions the bad state of the vessel was pointed out to him. The defendant himself also saw the vessel twice whilst she was repairing. The vessel was repaired so as to be completely seaworthy. The particulars of the plaintiff's demand were for 165*l.*, for materials furnished and labour bestowed upon the repairing of the vessel. Credit was given for 70*l.* paid by the defendant on account. Deducting the 70*l.* paid on account, and the 10*l.* paid into Court, the plaintiff claimed a balance of 85*l.* The learned judge told the jury to consider, 1st, whether any authority at all to repair the ship had been given by the defendant to the plaintiff; and secondly, if any such authority had been given, whether the defendant was authorized to exceed 80*l.* The jury found a verdict for the defendant. In Easter term last a rule nisi for a new trial was obtained, on two grounds. 1st, That the question had been improperly left to the jury; and secondly, that the payment of money into Court admitted the contract. The rule nisi was granted, on the first ground, on the supposition that the only question left by the learned judge to the jury was, whether *Mills* was the agent of the defendant. It appeared that the jury, upon the question being put to them at the desire of the plaintiff's counsel, immediately after the delivery of the verdict, stated that *Mills*

was not authorized by the defendant to order the repairs to be done. Against this rule,

1833.  
  
 MEAGER  
 v.  
 SMITH.

*Maule and E. V. Williams* now shewed cause. The case was properly left to the jury. It was material to consider to what extent the plaintiff was authorized to repair the ship. The defendant might be willing to expend a certain sum in repairing the ship, and no more. The payment of money into Court does not admit the defendant's liability beyond the sum paid in. Where no particulars of demand have been delivered, the payment of money upon the common counts does not admit a specific contract. Suppose in this case 10*l.* had been due from the defendant to the plaintiff for money lent, the debt of 10*l.* and this demand for repairing the ship might have been claimed under counts similar to those in this declaration, surely the payment of 10*l.* would not, in that case, be an acknowledgment of the contract for the repairs. Again, suppose there be both a special agreement and such a contract as might be proved under the common counts, and the defendant pays money into Court, upon a declaration containing only the common counts, is that to be holden an admission of the special agreement? The effect of paying money into Court upon the common counts is simply that of deducting from the plaintiff's demand the amount paid in. In *Seaton v. Benedict* (a) Mr. Justice Gaselee says, "On the subject of payment of money into Court I entertain no doubt. Payment into Court generally in (indebitatus) assumpsit, admits nothing beyond the amount of the sum paid in. Where, indeed, there is a special contract, the payment into Court admits that contract; but where, as in the common indebitatus assumpsit, the demand is made up of several distinct items, the payment admits no more than that the sum paid in is due." It is a privilege of the defendant to pay money into Court applicable to any demand the plaintiff may prove. It is not incumbent upon the de-

(a) 5 Bingh. 28.

1833.  
  
 MEAGER  
 v.  
 SMITH.

defendant to be prepared to prove upon what matter he paid money into Court. There is no authority to shew that the payment of money into Court generally relieves the plaintiff from any part of his proof. [*Parke, J.* Payment of money into Court admits that something is due on the cause of action stated in the declaration, and if there is but one transaction between the parties, is it not an admission that there is something due on that account?] It may be said that the 10*l.* paid into Court is money paid for the purpose of purchasing peace. It was for the jury to consider whether *Mills* had any authority to bind the defendant beyond the sum paid into Court.

*Evans* and *Whitcomb* in support of the rule. It was considered by every one at the trial to be a mere question as to the amount of damages, or what was a sufficient remuneration for the labour bestowed. The subsequent acts of recognition, by the defendant, were not left by the learned judge to the jury. If by the payment of money into Court the defendant acknowledged any liability, the amount of that liability was the question for the jury. This case arose since the late rule of court, which directs that the particulars of the plaintiff's demand shall be annexed to the record. In *Macarthy v. Smith (a)*, it was decided that it is unnecessary to prove a bill of particulars, and that in fact it is a part of the record. *Tindal, C. J.* there says, "the object of the late rule was to save the trouble of proving the bill of particulars." In this case the bill of particulars gave the defendant notice of the nature of the demand. [*Littledale, J.* A bill of particulars may be amended. It may have been that the full particulars were not delivered until after the money was paid into Court.] There were particulars annexed to the record, and therefore the money paid into Court must be considered as paid in with reference to the several demands contained in the particulars. It cannot be said that the defendant is

(a) *Moore & Scott*, 227 ; 8 *Bingh.* 145.

liable for 80*l.* and the owners of the ship are liable for the remainder.

1833.

MEAGER  
v.  
SMITH.

DENMAN, C. J.—I am of opinion that this rule ought to be discharged. It appears that substantially all the points of the case were left to the jury. I had rather the point of *authority* had not been left, as the payment of money by the defendant was a sufficient recognition by him of authority to a certain point. The question of liability having been submitted to the jury, they found a verdict generally. It is possible that they may have thought that *Mills* had authority to the extent of 80*l.* When a verdict is proposed to be set aside on the suggestion that the jury have founded their verdict upon incorrect grounds, it should be most clearly shewn that such is the case. I do not see sufficient ground for saying, from the question afterwards put to the jury, that they have proceeded upon improper grounds. Upon the whole I think the opinion of the jury was fairly given upon the case.

LITLEDALE, J.—I also think that this rule should be discharged. It has been contended on the one side, that the payment of money into Court is conclusive evidence of liability. On the other side, that it is not. Payment of money into Court may, under some circumstances, be evidence of the defendant's liability for the cause of action stated in the declaration. It has been said, that it is to be considered as a payment for the sake of purchasing peace. But it is not, in my opinion, to be regarded in that light in this case, but as a formal admission of a cause of action and an admission of liability. Then comes the question, to what extent is it an admission of liability? The money may be paid to meet a demand, perfectly distinct from that which is the subject of the action in Court. In this case it was competent for the defendant to shew that he was not liable beyond the sum of 10*l.*, the money paid into Court. The action was brought against the defendant, not for work done for himself, he, therefore, very possibly



1833.

MEAGHER  
v.  
SMITH.

might not be unwilling to be liable to a small amount:— he might be willing to have repairs made sufficient to fit the vessel for sailing, although he might be unwilling to give direction for repairs generally. It has been said in this case that the payment of money into Court must be an admission of that which is contained in the particulars, as they are now annexed to the record, and must be taken as part of the declaration; but I do not agree to that. The payment of money into Court may be long before the full particulars are delivered. The first particulars may state simply that the action is brought for work and labour. The second particulars, in which the cause of action is more fully set out, may not be delivered until after the money is paid into Court. Besides, the plaintiff by an order may change his particulars, and those particulars may contain other causes of action than those mentioned in the first. The safer way is to adopt the old rule which was pursued before the particulars were annexed to the record, otherwise we shall be involved in endless perplexity. It seems to me that the case was properly left to the jury. The second question was material, as the defendant might have given authority to have some repairs done, yet not beyond a specified amount. I see no reason for disturbing the verdict.

PARKE, J.—I do not feel quite satisfied that the jury have given their verdict upon a right ground; and if the case depended upon my decision I might send it for a second trial. Two questions were left to the jury: first, whether *Mills* had any authority to bind the defendant; and secondly, whether 80*l.* was a sufficient sum for the repairs. The jury seem to have considered only one question, namely, the first, whether *Mills* had any authority from the defendant; and I am left in considerable doubt whether the jury did not decide upon that point alone. The law as to the effect of payment of money into Court is clear. Where a count states a special contract, the payment of money into Court on that count admits the

contract. But where the counts are general, all that it admits is, that the defendant is liable for some demand to the amount paid in. It is the same as if the defendant had paid the plaintiff 10*l.* The particulars having been delivered with the declaration, shewed that the action was for work, labour and materials; the payment of 10*l.* into Court, if there is no other contract of the kind between the parties, is an admission of that contract to the extent of 10*l.* In this case there was no question except as to the repairs of the ship *Auguste Virginie*. The defendant having paid money into Court in this case, cannot say he did not authorize any thing to be done to the ship, but he may say he did not authorize any repairs beyond the sum of 10*l.* The questions were properly left to the jury, and they may have thought that 80*l.* was sufficient for the repairs. They may have misconceived the point which they were to consider, but that does not clearly appear. Upon the whole I think the rule must be discharged.

1833.  
  
 MEAGER  
 v.  
 SMITH.

Rule discharged.

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 TOMLINSON, Gent. one &c. v. BRITTELBANK.

**THIS** was an action of slander. The declaration contained several counts, in all of which but the last the words complained of were alleged to have been spoken of the plaintiff in his character of an attorney. In the last count, however, it was not stated that the words were spoken of the plaintiff in his profession. The words complained of in that count were, "you robbed *White*;" and the innuendo was, "thereby meaning that the said plaintiff had been guilty of an offence punishable by law." The statement of the defendant's having used these words, was not preceded by any colloquium from which the sense in which the words were used might have been collected. Upon the trial of the cause before *Parke, J.* at the last assizes for the county of Stafford, the plaintiff obtained a verdict, which was taken upon the declaration generally.

On motion in arrest of judgment, the words 'you robbed *White*' held to be sufficient to sustain the verdict, although no colloquium shewing the sense in which the word 'robbed' was used.

1893.  
  
 TOMLINSON  
 v.  
 BRITTELBAKE

*Richards* now moved in arrest of judgment. The words complained of in the last count not being alleged to have been spoken of the plaintiff in his profession, are not actionable, and the verdict having been taken upon the declaration generally, the defendant is entitled to an arrest of judgment for the defect in this count. It is true that in the act of 7 Geo. 4. cap. 29, the word *robbed* is used, but it is a word of very equivocal meaning; and there being no colloquium to shew the peculiar sense in which the word is used, it is sufficient to shew that it is equivocal. In Comyn's Digest (a) it is said, "if a man say he poisoned A., without an averment that he is dead, those words are not actionable." If a party say of another that he has been guilty of felony, it would not be sufficient to maintain an action. [*Denman*, C. J. That is but the expression of an opinion. Here the party charges another with a crime in the very terms used by the act.] That would have been sufficient, if the party had stated a colloquium from which it had appeared that the word had been used in the sense intended in the act. In Comyn's Digest there is the following passage (b): "Yonder is Dr. A. robbing the church: he has robbed the church." This slander is ranged under the title of "Words which slander a man in his office," from which it is to be inferred, that if the clergyman had not been charged with robbing in his profession, the words could not have supported the action. [*Parke*, J. In the older cases in Comyn's Digest, the words were criticised too nicely. To prevent actions, we now understand words in their ordinary sense.] In *Holt v. Scholefield* (c) the words were, that the plaintiff had forsworn himself, and the innuendo was, that the defendant meant the plaintiff had committed wilful and corrupt perjury. The Court, on motion in arrest of judgment, held the words insufficient to sustain the verdict. [*Denman*, C. J. Forswearing is not in some cases a legal crime, and is not subject to any temporal punishment.]

(a) Vol. 1. p. 188, title Action on the Case for Defamation, (D. 16).  
 the Case for Defamation, (F. 2). (c) 6 T. R. 691.

(b) Vol. 1. p. 181, title Action on

DENMAN, C. J.—It seems to me that the words alleged to have been spoken, are of themselves actionable. To say of a man that he has robbed another, is a very strong expression. The word robbed, like all words, is liable to have its meaning perverted, and to be used in more senses than one; but the law in this case acknowledges but one meaning, and that is the worst. In the case that has been cited, the words were not actionable, because forswearing is a word of equivocal meaning, and may be that for which the party is subject to no temporal punishment.

1833.  
TOMLINSON  
v.  
BRITTELBANK

LITLEDALE, J.—It does not seem to me that the expression “you robbed *John White*,” necessarily implies a charge that the plaintiff had taken by force the property of *White*, and I doubt the sufficiency of the count.

PARKE, J.—I have no doubt that the words are sufficient. They import that the plaintiff has committed a crime, for which he is punishable with death. This is the *primâ facie* meaning of the word ‘robbed.’ The effect of an innuendo or colloquium in this case, could only be to shew that the word was used in a sense inferior to that which must *primâ facie* be presumed.

Rule refused.

#### The KING v. The Inhabitants of WOODBRIDGE.

AN order of two justices, whereby *Joseph Bird* was removed from the parish of St. Matthew in the borough of Ipswich, in the county of Suffolk, to the parish of Woodbridge in the same county, was upon appeal confirmed by the quarter sessions, subject to the opinion of this Court on the following case.

To gain a settlement by executing an office, the party must reside in the parish in which he executes the office.

The pauper being settled at Woodbridge, was on the 29th September, 1820, appointed by the bailiffs of Ipswich a crane porter at the common quay in that town. The business of the crane porters is to unload vessels arriving at the common quay. These vessels and their cargoes are of every description, and are the property of persons residing and carrying on trade in various parts of the king-

1833.  
  
 The King  
 v.  
 Woodbridge

dom. The pauper had what he earned from the captains of the ships for unloading at the quay, and *℥*. per annum from the bailiffs for keeping the quay clear. The sessions found that this was a public annual office, and that the pauper served the office for a year. The quay, where the vessels are unloaded, is situate in *the parish of St. Mary, at the quay* in Ipswich, but during the whole of the year the pauper *resided in the parish of St. Matthew*, in the same town. The Court of Quarter Sessions thinking that the office was executed in the parish of St. Mary, at the quay, decided that no settlement was gained in St. Matthew's.

*Austin*, in support of the order of sessions, was stopped by the Court.

*Biggs Andrews*, *contra*. To gain a settlement by virtue of the sixth section of 3 *W. & M.* cap. 11, it is not necessary that the party should reside in the parish where he executes his office. The case of *The King v. Liverpool* (a) is an authority for this position. There the pauper, who resided in the parish of Liverpool, was appointed sexton of the church of St. James. The churchyard was partly in the parish of Wilton, and partly in the parish of Liverpool, but no burial was ever made in the part in the parish of Liverpool. It was held that the pauper gained a settlement in Wilton. Yet there the pauper did not actually exercise the office in the parish of Liverpool. [*Parke, J.* If a party were appointed constable in a peaceable parish, and had consequently no duty to perform, would he not execute the office of constable in that parish?] *Rex v. St. Nicholas, Hereford*, is also an authority for the same position (b). [*Denman, C. J.* There also the party resided in the parish in which he executed the office].

By the COURT.—The words of the statute are clear and precise. The order of sessions must be confirmed.

Order of Sessions confirmed.

(a) 3 T. Rep. 118.

(b) 10 B. & C. 832.

## The KING v. SNOWDON.

1855.

UPON appeal against certain rates for the relief of the poor of the parish of St. Nicholas, in the town and county of Newcastle-upon-Tyne, assessed upon Matthew Snowdon, in the year 1831, the Court of Quarter Sessions affirmed the rates, subject to the following case :

The mayor and burgesses of Newcastle-upon-Tyne are, as well by prescription as by virtue of divers charters, and particularly a charter of the 31st *Eliz.*, constituted a corporation by or under the name or style of the mayor or burgesses of the town of Newcastle-upon-Tyne, in the county of the town of Newcastle-upon-Tyne, and have been seised from time immemorial of the town and borough of Newcastle-upon-Tyne aforesaid in their demesne as of fee, and hold the same in fee farm under the Crown at a yearly rent of 100*l.* The mayor and burgesses claim by prescription to demand and receive as a *toll-thorough* divers tolls in respect of goods, not being the property of a burgess of the town, brought into and carried out of the town, in consideration of their keeping in repair all the public streets of the town, and also two-thirds of the bridge, called Tyne Bridge, which connects the said town with the county of Durham. By an act of parliament passed in 1822, it was declared, that thereafter it should be lawful for the mayor and burgesses of the said town, and their successors, and their lessees or tenants of the said tolls, by themselves or their servants, collectors or agents, to demand and take of and from every person who should bring or convey into or out of the said town, by or through any of the avenues or passages leading into or out of the said town, any goods liable to the said tolls, such tolls as the said mayor and burgesses were by law entitled to receive ; and that thereafter it should be lawful for the said mayor and burgesses, or their tenants or lessees of the said tolls, to erect, set up, and maintain, at all and every of the avenues or entrances leading into or out of the said town

Lessee of tolls is not rateable to the poor in respect of such tolls, although he occupy a toll-house under the same demise.

1833.  
  
 The KING  
 v.  
 SNOWDON.

at which the said tolls or any of them should be demandable, any convenient and proper toll-house or building, with suitable convenience for the accommodation of any person or persons employed in the collection of the said tolls. The act then required that every collector should place his Christian and surname in some conspicuous part of the toll-house. The appellant, who is not an inhabitant of the parish of St. Nicholas, is lessee under the mayor and burgesses of the toll-house situate in the parish of St. Nicholas, at the north end of Tyne Bridge, (one of the ancient avenues leading out of the town,) and of such of the above-mentioned tolls as are collected at that avenue. The joint annual value of both tolls and toll-house is 500*l.*, but the annual value of the toll-house, without the tolls, is only 10*l.* The toll-house in question is occupied by the servant or collector of the appellant, and the appellant's name is put up in front of the toll-house. The tolls are not actually paid to and received by the collector in the toll-house, but are collected from the parties liable to pay the same upon the street in front of and as they pass the toll-house. The total annual produce of the tolls received at all the avenues or entrances into the town, the title to which is founded on the consideration of repairing the streets, is 1700*l.*, whilst the annual expense of repairing the streets amounts to 4000*l.*; and it does not appear whether or not the appellant makes any thing, the deficiencies being supplied out of the general fund of the corporation. The rent under which the appellant holds these and other tolls is paid half-yearly into the town's chamber, the legal place of receipt of the corporation revenue. The appellant is rated in all the four rates or assessments as follows: viz.

“*Snowdon, Matthew*, toll-house, situated at the north end of Tyne Bridge, and the tolls payable there, 500*l.*”

The question for the opinion of the Court is, whether the appellant is rateable for the toll-house and tolls, or for either of them. If he be rateable for the toll-house alone,

then the four rates or assessments appealed against to be amended, by striking out in each the words "and the tolls payable there," and substituting the figures "10*l*." for the figures "500*l*." If he be ratable for neither the tolls nor the toll-house, then the order of sessions to be quashed. If he be ratable for tolls either alone or together with the toll-house, the order of sessions to be confirmed, with such amendment, if any, with respect to the amount in which the rate is made, as the Court shall see fit.

1833.  
  
 The KING  
 v.  
 SNOWDON.

*Aglionby* and *T. Greenwood* in support of the order of sessions. In *Rex v. Eyre* (a), the Court observed that it was not stated that the lessee was the *occupier* of any toll-house. And the question now to be considered is, whether, under the authority of *Rex v. Eyre*, there is not in this case a sufficient occupation of the toll-house to make the occupier liable to be rated in respect of the tolls. Here the toll is a toll *traverse*, and not a toll *thorough*, as the *soil* of the streets belongs to the corporation, *Rickards v. Bennett* (b). Although in the special case the toll is called a toll *thorough*, that is not conclusive. The soil of the streets and of the toll-house being in the corporation, and the appellant occupying both, he is liable to be rated for both.

*Ingham*, *contra*, was stopped by the Court.

PER CURIAM.—The appellant in this case is merely the lessee of the tolls; he does not occupy any part of the *soil* in respect of which the tolls are payable. To make the occupier liable to be assessed in respect of the tolls, it should be shewn that he is the occupier of the ground traversed by the parties by whom such tolls are paid. If the toll-house were pulled down, the lessee would nevertheless be entitled to receive the tolls: whatever, therefore, may be the nature or description of the toll

(a) 12 East, 418.

(b) 2 Dowl. & Ry1. 389; 1 Barn. & Cressw. 233.



1833.

**The KING**  
v.  
**SNOWDON.**

paid, whether it be toll thorough or not(a), it cannot be assessed.

Rate amended as to the tolls(b).

(a) For the distinction between toll thorough and toll traverse, see 2 Roll. Abr. 522, translated 20 Vin. Abr. 289; Com. Dig. *Toll* (B.) (C.)

(b) *Vide Underhill v. Ellicombe*, Macleland & Younge, 450; *Chanter v. Glubb*, 4 Mann. & Ryl. 334; S. C. 9 Barn. & Cressw. 479.

**The KING v. The Inhabitants of ST. HELEN'S, AUCKLAND.**

A contract imposing upon the servant a fine if he absent himself without having performed a reasonable day's work, does not constitute an exceptive hiring; and a settlement is gained by service under it.

**UPON** an appeal to the quarter-sessions against an order of two justices, by which *George Riley* was removed from the township of Coundon, in the county of Durham, to the township of St. Helen's, Auckland, in the same county, the order was confirmed, subject to the opinion of this Court on the following case:—

The pauper was bound as a pitman to *Dixon and Co.*, the owners of the Eden Main Colliery, situate in the township of West Auckland, Durham, by a deed, of which the following is a copy:—

“Memorandum of an agreement made the 4th of February, 1815, between *George Dixon, John Dixon and Thomas Dixon*, copartners in the colliery called Eden Main Colliery, of the one part, and the several pitmen whose names are hereunder written, of the other part, Witnesseth, that the said pitmen, in consideration of the wages, sum or sums of money, to be paid as hereinafter mentioned, do hereby severally undertake, promise, and agree, to and with the said copartners or masters, to *hew*, put, and work coals in and within the said colliery called Eden Main, from the day of the date hereof, for and unto the 4th of February, 1816, in the manner and at the prices following; (that is to say,) to *hew* coals at 2s. 6d. a score, of twenty-five *corres* to each score. The said pitmen also agree to give to the said masters the usual fire coal carf for each day they are at work, over and above the said number of twenty-

five corves to the score; they the said pitmen hereby further promise and agree in every particular to drive their boards of such a breadth, and to prop and maintain their own work, and to work in a workmanlike manner, properly, fairly, and orderly, as directed by their said masters or their agent for the time being, and to drive headways at 8d. a yard, and headway walls at 6d. a yard, when, where, and in such manner as directed by their said masters or their said agent: And further, the said pitmen agree to send as many setters to bank as the same will admit and afford, and also to put coals in their course at the prices then given, and to have liberty to hew half a score of coals in the putting morning, which are to come to bank the same day: And the said pitmen do hereby further severally undertake, promise, and agree to work constantly at the said colliery until the said 4th of February, 1816, or to forfeit and pay each man to the said masters, or to their said agent, 1s. for each and every day that he shall absent himself from the said work, or not work a reasonable day's work to the satisfaction of the said masters, or their said agent; and, on the other hand, the said masters for themselves agree to pay to each of the said pitmen 1s. a day for each or every day they shall wilfully or without just cause lay any of them off work: And the said masters do hereby undertake, promise, and agree to pay the said pitmen the wages abovementioned, agreeably to the undertaking of the said pitmen." Then followed stipulations as to the number of corves of coal, the filling of such corves, and the mode of measuring them. The pauper served under this deed for a whole year and received his wages, and during that period no forfeit was incurred either by him or by his employers, by reason of any interruption in the colliery or otherwise. The pauper remained in the service of the same employers as a pitman for eleven months after the expiration of the deed; and from the date of the deed to the time of his finally quitting the colliery, a period of nearly two years, he slept in the appellants parish.

1838.

The King  
v.  
The Inhabit-  
ants of  
St. Helens  
Auckland.

1833.

*The King*  
v.  
*The Inhabit-*  
*ants of*  
*St. Helens*  
*Auckland.*

*Ingham*, in support of the order of sessions.—The agreement is very plainly a contract to serve for a year, without any exception. This case is similar to the case of *Rex v. Byker (a)*. Indeed it is much stronger than that case. There the pauper was only obliged by the contract to work 14 hours a day. It might, therefore, have been said, that for the remainder of the time he was his own master. Here the memorandum of agreement says, that the pauper is to work for one year *constantly*, and he is to do a reasonable day's work. In *Rex v. All Saints, Worcester (b)*, it is said by *Bayley, J.*, when speaking of exceptive hirings, "The distinction between the two classes relative to the subject is, that in the one the exception to the service is expressed in the contract, and in the other it is left by the custom of the particular trade to be raised by implication." The effect of the agreement here is, that the master is to be entitled to the whole day's work, provided he requires nothing unreasonable. *Rex v. Gateshead (c)*, which will be cited on the other side, differs from the present case in this, that the stipulation there was, that each man should, on each *working day*, do such a quantity of work as should be deemed equal to a full day's work, whereas here the party is to work *constantly*.

*S. Temple*, *contra*. This was not such an agreement as would give the master an absolute controul over the servant during the whole year. The hiring in this case must be considered as exceptive. In *The King v. Byker*, *Bayley, J.* says, "an exceptive hiring is one by which the relation of master and servant will not subsist for the whole year, unless some further arrangement is entered into; and if by the bargain, days or hours are excluded from the service, that is an exceptive hiring." This is not a conditional hiring, as in all cases of conditional hirings some anticipated event which is to determine or suspend the service is provided for by the parties;

(a) 3 D. & R. 330; 2 B. & C. 114. (c) 3 D. & R. 333; 2 B. & C.

(b) 1 B. & A. 324.

here there is no such event named. The pitmen make no positive agreement to work constantly by the year: they may absent themselves upon the payment of one shilling a day. [*Parke, J.* That is like the reservation of two shillings and sixpence in *Rex v. Byker*.] That case is distinguishable from this, for there the hiring was absolute for a year; and afterwards there came a covenant independent of the contract, in the nature of a bond, or as a collateral security for the performance of it. Here the agreement is in the alternative: the pitmen are either to work, or pay a shilling a day. This case is like *Rex v. Gateshead*; it was there stipulated that each man should do on each *working* day such a quantity of work as should be deemed equal to a full day's work, and should not leave the pit until that quantity was completed, or in default thereof should forfeit 2s. 6d. The expression "each working day" intimated that there were days when no work was to be done. In this agreement the words are for each and every day he shall absent himself from the said work, or not work a reasonable day's work.

DENMAN, C. J.—*Rex v. Gateshead* does not appear to have been decided upon the ground of the exception of the ten days at Christmas, but upon the words "each working day," which the Court thought implied that the pitmen were not to work every day. The cases of *Rex v. Gateshead* and *Rex v. Byker* certainly run near to each other. I think this falls within the principle laid down in *Rex v. Byker*. There was no period of the twenty-four hours during which the master could not have required the service of the pitmen. It is proper to observe, that the case of *The King v. Gateshead* is differently and more fully reported in *Dowling* and *Ryland's* Reports, than in *Barnewall* and *Cresswell's*. In the latter reports the exception as to the ten days is an exception by the master from the time he was to find work for the men. The reasoning of the Court appears to have proceeded on the statement of facts con-

1833.  
  
 The KING  
 v.  
 The Inhabit-  
 ants of  
 ST. HELENS  
 AUCKLAND.

1833.  
 The KING  
 v.  
 The Inhabit-  
 ants of  
 ST. HELENS,  
 AUCKLAND.

tained in the report by *Barnewall* and *Cresswell*, and therefore that may be taken as the correct report of the case.

**LITLEDALE, J.**—If neither *Rex v. Byker* nor *Rex v. Gateshead* had come before the Court, I should have had no difficulty in disposing of this case. It is true there is a stipulation as to the payment of a shilling a day; but that amounts to nothing more than this, that the masters and men shall mutually recover a shilling a day by action or otherwise, if either of them do not perform the contract. The contract is for a whole year. During each day the master had a right to call upon the servant for work. I do not see any reason why this should be called an exceptive hiring.

**PARKE, J.**—This case falls within the authority of *Rex v. Byker*. The case of *The King v. Gateshead* is correctly reported. It seems to me that it was there stipulated by implication that the men might leave the pit when they had done a full day's work. Here the party could not have done so.

Order of Sessions confirmed,

#### THE KING v. THE INHABITANTS OF TADCASTER.

A settlement may be gained by renting a tenement even since 6 Geo. 4, c. 57, although the property rented and occupied consist partly of a dwelling-house, and partly of a building, hired at different times, under different landlords.

**BY** an order of two justices, *Jane Silversides*, widow, and her two children, were removed from the township of Leeds, in the West Riding of the county of York, to the township of Tadcaster, in the same Riding. Upon appeal, the Court of Quarter Sessions confirmed the order, subject to the opinion of this Court upon the following case.

*William Silversides*, the late husband of the pauper, being settled by apprenticeship in the township of Tadcaster,

went to reside in the township of Leeds, and in November, 1827, (subsequently to the passing of the act of 6 *Geo.* 4, c. 57,) took a dwelling-house within the latter township as tenant to *W. W.*, and occupied the same until September, 1830, at the yearly rent of 6*l.* 10*s.*, which rent was duly paid for all that period. In May, 1828, he also took a building used as a shed, where he carried on his business of a bricklayer, situate in the township of Leeds, as tenant to *R. M.*, and occupied the same until September, 1830, at the yearly rent of 5*l.*, which rent was also duly paid for that period. The dwelling-house was wholly separate and distinct from and unconnected with the other building, there being a separate and distinct tenement between them belonging to and occupied by another person. The question for the opinion of the Court is, whether, under these circumstances, *W. Silversides* gained a settlement in the township of Leeds.

1833.  
  
 The KING  
 v.  
 TADCASTER.

*Milner* and *Baines* in support of the order of seassons. The right of acquiring a settlement by renting a tenement of the annual value of 10*l.*, arose from the negative words used in the statute of 18 & 14 *Car.* 2, c. 12. That statute limited the power of removal to such persons as "come to settle in any tenement under the yearly value of ten pounds." The next act, 9 & 10 *Will.* 3, c. 11, declared that no person who should come into any parish with a certificate of being settled in another parish, should be adjudged to have procured a legal settlement in the parish in which he came to reside, unless he should take a tenement of the value of 10*l.*, or should execute an annual office. For a considerable period of time after the passing of these two statutes, it was holden that the "tenement" must have been taken of one landlord, and at one entire rent. In *South Sydenham v. Lamington (a)*, the Chief Justice says, "two distinct tenements in two parishes, making together

(a) 1 *Str.* 57.

1833.  
 The King  
 v.  
 TADCASTER.

10*l.* per annum, will give no settlement; but it seems to me to be otherwise when the tenement is entire." (a)

Subsequently the Courts held that the tenant acquired a settlement by taking different tenements at distinct rents. In *Rex v. Newnham* (b), the Court decided that a settlement was gained by renting a house at 3*l.* a year of one landlord, and land at 8*l.* of another landlord. In one case the Court went so far as to decide that a settlement was conferred by a right of pasturage for sheep of the value of 10*l.* a-year. The 59 *Geo.* 3, c. 50, enacts, that no person shall acquire a settlement by reason of his dwelling for 40 days in any tenement rented by him, unless such tenement shall consist of a house or building within &c., being a separate and distinct dwelling-house or building, or of land within &c., or of both, *bonâ fide* hired by him at and for the sum of 10*l.* a-year at the least, for the term of one whole year, nor unless such house or building shall be held, and such land occupied, and the rent for the same actually paid for the term of one whole year at the least, by the party hiring the same. These words seem only to contemplate a single contract of hiring. But after the passing of this statute, it was held that the tenement might still consist of various parcels, taken at various times, *Rex v. North Collingham* (c), *Rex v. Stowe* (d), and that the occupation of different tenements under different yearly hirings of the same landlord, would satisfy the words of the statute. The 59 *Geo.* 3 was repealed by 6 *Geo.* 4, c. 57, which enacts, that no person shall acquire a settlement in any parish &c., by or by reason of settling upon, renting, or paying parochial rates for any tenement, not being his or her own property, unless such tenement shall consist of a separate and distinct dwelling-house or building, or of land or of both, *bonâ fide* rented by such person in such parish &c., at and for the sum of

(a) In that case the question was, whether two tenements in different parishes could be joined to make up the 10*l.*

(b) *Burr. Sett. Cases*, 756.

(c) 2 *Dowl. & Ryl.* 578; 1 *Barn. & C.* 578.

(d) 4 *Barn. & C.* 87; *S. C.* by the name of *Rex v. Sturton* by *Stow*, 6 *Dowl. & Ryl.* 110.

10*l.* in the year at the least, for the term of one whole year, nor unless such house or building or land shall be occupied *under such yearly hiring*, and the rent for the same, to the amount of 10*l.*, actually paid for the term of one whole year at the least. Provided always, that it shall not be necessary to prove the actual value of such tenement. The act of 1 *W.* 4, c. 18, prevented a person from gaining a settlement who had underlet the premises rented. The act of 6 *G.* 4, differs from that of 59 *G.* 3. In the first place, the acquisition of a settlement by the payment of parochial rates, except in one instance, is done away with. In the next place, the tenement must be held 'under such yearly hiring.' It cannot have been the intention of the legislature to allow a settlement to be acquired by the payment of a number of trifling sums; for the act speaks of occupation under such yearly hiring, and it would be doing violence to the grammatical construction, to say that several hirings can be embraced by this expression. It is probable that the language was altered for the purpose of putting an end to settlements by occupation of several tenements, whose aggregate value amounted to 10*l.* It is not, however, necessary to contend that the occupation of two distinct buildings does not confer a settlement, it is sufficient if the act requires that both the buildings should be taken at the same time. The point was adverted to but not decided in *Rex v. Macclesfield (a)*, in which *Parke, J.* says, "I am by no means satisfied that the occupation of a dwelling-house and another distinct building in the same parish, may not be sufficient to confer a settlement. Judging from the grammatical construction of the clause, it is clear that the legislature intended to allow the combination of different tenements for the purpose of acquiring a settlement in two cases only; first, where a separate and distinct *dwelling-house* was held with land; secondly, where a separate and distinct *building* was held with land. It is to be observed that the singular

1833.

The KING  
v.  
TADCASTER.

(a) 2 B. &amp; Ad. 870.



1833.  
  
 The King  
 v.  
 TADCASTER.

number is preserved throughout the whole clause. The express permission to join a dwelling-house with land, and a building with land, is an implied exclusion of the joint holding of a house and building. It is said by *Parke, J.* in *Rex v. Ditchet (a)*, "it is a very safe rule of construction to adhere to the words of an act of parliament in their grammatical and natural sense, unless it appear clearly from the context that they were intended to be used in some other sense." In *Rex v. Great Bentley (b)*, Lord *Tenterden*, in giving judgment, said, "we think it much the safer course to adhere to the words of the statute, construed in their ordinary import, than to enter into any inquiry as to the supposed intentions of the persons who framed it." The object the legislature had in view in passing this act, was the prevention of litigation. Now the inquiry as to a settlement is necessarily more complex when the settlement is to depend upon compliance with all the conditions of the statute in respect of several tenements, than where the inquiry is confined to one tenement. [*Parke, J.* The object of the last act was to prevent all discussions about value.] That was one principal reason; but it was also intended to prevent litigation arising from *this* source.

*Cresswell*, *contra*. It is not necessary to inquire into the policy of the law; the only material inquiry is, how the law stands. Under the words of this statute, the dwelling and shed which were held by the pauper, may with as much propriety be joined so as to constitute a 10*l.* tenement, as if that which he occupied had been a dwelling-house and land. The statute says, that the tenement must consist of a dwelling-house or building, or land, or of both. Now what reason can be assigned for saying that the words 'or of both,' are only to have the effect of joining land with a dwelling-house or a building? The several parts of the sentence are in the disjunctive, and if any one is to be ex-

(a) 4 Man. & Ryl. 151; 9 B. & C. 176.

(b) 10 B. & C. 536.

cluded from being operated upon by the word "both," it may as well be *land* as any other. So far as this settlement is concerned, the statute may be read thus: "unless such tenement shall consist of a separate and distinct dwelling-house or, building or of both, *bonâ fide* rented by such person &c. According to the argument on the other side, if a person rented a house and building and land together, of the value of 10*l.* a-year, he would not gain a settlement. It has been attempted to distinguish the language of the 6 *G.* 4, from that of the 59 *G.* 3. There is, however, no foundation for that distinction, so far as respects the case now before the Court. Previously to the 59 *G.* 3, parties were permitted to gain a settlement by a tenement held under different hirings, provided there was an occupation to a sufficient amount during a whole year. By the 59 *G.* 3, the tenement is required to consist of a house or building, or of land, or both, *bonâ fide* hired by such person, at 10*l.* a-year for one whole year; and the party hiring the same is required to occupy and pay the rent for one whole year. Under this statute it was holden in *Rex v. North Collingham*, that the tenement taken might consist of various parcels. Lord *Tenterden* there says (a), "under the former acts a tenement might consist of various parcels, taken at various times, and there is nothing in this act to vary the old law in that respect." *The King v. Tonbridge* (b) was to the same effect. The statute of 6 *G.* 4, was passed in consequence of frequent disputes having arisen as to the value. The only difference between the 59 *G.* 3 and 6 *G.* 4, that bears at all upon the present point, is, that under the latter act the tenement is not required to be occupied by the party hiring the same, but "under such yearly hiring." In *The King v. Great Bentley* (c), and *The King v. Ditchet* (d), it was held, that a party hiring and underletting a part of the tenement,

1833.  
  
 The KING  
 v.  
 TADCASTER.

(a) 2 D. & R. 743; 1 B. & C. 583.

(b) 6 B. & C. 88.

(c) 10 B. & C. 526.

(d) 4 Mann. & Ryl. 151; 9 B. & C. 176.

1833.

The KING  
v.

TADCASTER.

was constructively in the occupation of the tenement under such yearly hiring, and it was in order to put an end to this constructive occupation, that the statute of 1 W. 4 was passed. It is said that under 6 G. 4, the rent of 10*l.* should be one entire rent payable to one landlord. The object of fixing a certain sum was, that the party should have credit to that amount; and it is not material for this purpose, that the whole rent should be payable to one person. The party is equally qualified within the intention of the act, whether he pays an entire rent to one man, or several portions, amounting to the same sum, to several landlords. In this case it appears that the pauper occupied premises amounting to the value of more than 10*l.* a-year, and that he occupied them for more than a whole year. It has been argued that there must be a concurrent occupation of the several premises for the space of a year, but in the case of *Rex v. Ormsby (a)*, it was decided that the occupation of a house and land each for the space of one year, but commencing and ending at different periods, might yet be such a joint occupation as would confer a settlement.

DENMAN, C. J.—It has often been observed, that under the statute of 12 & 13 Car. 2, the word ‘tenement’ has received a wider construction than the legislature intended to give to it; still we must be bound by the cases which have been decided upon the subject, unless it clearly appears that by some of the later acts an alteration has been made in this respect by the legislature. Now it appears to me that the legislature has not, by any of the more recent enactments, hit this precise case. The same construction has been put upon similar words in the 59 Geo. 3. In *Rex v. Stowe, Abbott, C. J.*, says, “It has been contended that the legislature must have meant the having occupation and payment to be for the same year. If that had been their intention, it would have been easy to say that the

(a) *Ante*, p. 27; 4 B. & Adol. 214.

occupation and payment should be for *such* term." *Holroyd, J.*, says, "If it had been intended that the occupation should be for the same term as the hiring, the legislature would probably have introduced the words *for the said term*. It seems to me that the words 'nor unless' have been used in order to divide the sentence, and to elude the construction now contended for on behalf of the appellants." The 6 *Geo.* 4 makes an alteration, but, as it appears to me, not an alteration which affects this case. That act says, "unless such tenement shall consist of a separate and distinct dwelling-house or building, or of land, or of both." I think it would be too much to say that the collocation of the words in this sentence will prevent the acquisition of a settlement by the occupation of any two of the three things there enumerated.

1833.  
The KING  
v.  
TADCASTER.

LITLEDALE, J.—I am also of opinion that a settlement was gained by renting the house and shed in this case. There has been a discussion as to the meaning of the word "tenement." A *tenement* means that which a man *holds*, and it is immaterial whether he holds it of one man or of two, or more. The object of the statute was, that a man, to gain a settlement, should hold premises to a certain amount, whether they were taken jointly or by distinct takings. Suppose three fields are taken by different hirings, this would not be, as is contended, a tenement. Or suppose a man to take half a field of one person, and half a year afterwards hires the remainder of another landlord, this would not, according to the argument, be an entire tenement. But I think that the meaning of the word "tenement" is not confined to what a man takes at one time. Then it is said, that under the words "shall consist of a dwelling-house or building, or of land, or of both," it is not competent to join a dwelling-house and building. The language of the legislature is incorrect, but I think that a house and building may be connected; and I will even go

1833.

The King

v.

TADCASTER.

further, I think that the word "both" may mean all three put together.

PARKE, J.—I am not sure that by our decision we are giving effect to the intention of the legislature, but that intention is most obscurely expressed. In *Rex v. Macclesfield* I inclined to think that the occupation of a dwelling-house and another distinct building, might confer a settlement. If they cannot be connected together, then a distinct house and pigstye, taken at an entire rent of 100*l.*, would not confer a settlement. Or suppose a house and detached building of the value of 19*l.* a year, or a house and pigstye of the value of 11*l.*, if they cannot be connected together, then in each case a question as to the apportionment of the rent might arise. I cannot think that the legislature meant that all these questions as to value should be raised. A great deal of litigation will be prevented by the construction which we are putting upon the act. *Rex v. North Collingham* has decided that a tenement may be held under two distinct hirings. For these reasons I am of opinion that the order of sessions ought to be quashed.

Order of Sessions quashed.

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OGLE v. STORY, Gent. one &c.

The mortgagee's attorney having possession of the title-deeds has a lien upon such deeds for costs due to him from the mortgagee:

**ASSUMPSIT** on the common money counts. Plea, general issue. The cause was tried before Lord Tenterden, C. J., at the adjourned sittings for London, after Trinity term, 1832, when the following facts appeared:

*Thos. Nicholson*, being seized of a copyhold in Hertfordshire, on the 12th of June, 1822, mortgaged it to Mr. *Robert Fulwood*, in fee for 2000*l.* *Nicholson* subsequently executed a second mortgage to the plaintiff for 4000*l.* and

1833.  
 OGLE  
 v.  
 STORY.

interest, and afterwards became bankrupt. The property was put up for sale by auction, and the plaintiff became the purchaser for 3100*l*. The estate was a second time put up for auction, and Mr. *Pemberton* became the purchaser. When the parties met for the purpose of completing the conveyance of the estate to *Pemberton, Minshull*, the clerk of the defendant, who was the attorney of *Fulwood*, refused to give up the deeds relating to the estate, unless the principal and interest due to *Fulwood*, and likewise the costs of the defendant, were paid to him. The amount of the bill of costs was 46*l*. 17*s*. 11*d*. The plaintiff complained that the amount was large, but said he should pay the bill, and look it over afterwards. The defendant's clerk said he had no discretion. *Pemberton* then, with the knowledge of the plaintiff, gave to *Fulwood* a cheque for the amount of principal, interest, and costs, and the latter gave his cheque to *Minshull* for the amount of the costs. *Minshull* gave a receipt for the amount of the costs, as so much money received by the defendant from the plaintiff, by the payment of *Pemberton* the purchaser. The present action was brought for the recovery of so much of these costs as the plaintiff was not liable to pay. It was objected on the part of the defendant that he had a lien upon the deeds for the amount of his costs, against all the world. A verdict was, however, found for the plaintiff, damages 10*l*., the learned judge giving the defendant leave to move to enter a nonsuit. In Michaelmas term last *F. Pollock* obtained a rule accordingly, against which,

Sir *J. Scarlett* and *Platt* now showed cause. It is contended that the defendant had a lien on the title-deeds, and had a right therefore to refuse to part with them until the amount of his demand was paid. To this there are two answers; in the first place, he could not have a lien for more than he was entitled to receive; and in the second place, he had not a lien upon his client's deeds beyond his client's interest in those deeds. First, *Fulwood* was only en-

1833.



OGRE

v.

STORY.

titled to a reasonable sum for his costs and expenses. He could not retain the deeds for more than a reasonable sum for costs, and the plaintiff therefore can have no greater right to retain the deeds than *Fulwood* himself; and secondly, *Fulwood* held the deeds subject to the equitable right of the plaintiff, who was the second mortgagee. *Fulwood* could only have a property in the deeds commensurate with his rights, and would have been obliged to re-transfer the estate upon payment of his mortgage money and his reasonable costs. He could not communicate to the defendant, his attorney, a greater interest in the deeds than he himself had. [*Parke, J. Fulwood* had the legal interest in the deeds; had he pledged the deeds, the pawnee could have retained them until the money he had advanced was paid, and the attorney is in the same situation as the pawnee.] The original mortgagee could not, it is apprehended, increase his own interest by pledging the deeds for the full value of the estate.

*F. Pollock* and *F. Kelly*, in support of the rule, were stopped by the Court.

DENMAN, C. J.—It makes no difference that the defendant was the attorney of *Fulwood*. The deeds were placed in his hands to secure a sum of money, and *Fulwood* had a legal right to pledge them.

LITTLEDALE, J.—*Fulwood* is the mortgagee for 2000*l.*, the parties pay off the mortgage money, and find the deeds in other hands; they must pay the money, and take their remedy against *Fulwood*.

PARKE, J.—The defendant had clearly a lien to the amount of 46*l.* 17*s.*, supposing it a just bill between him and *Fulwood*, and *Fulwood* might pledge the deeds to that amount; the plaintiffs may recover in equity from *Fulwood* that which has been overpaid.

Rule absolute.

WM. TUCKER, Executor of GEORGE TUCKER, v. EMME-  
LINE TUCKER, Executrix of CHARLOTTE TUCKER.

1833.

**DEBT** on a bond, dated 16th November, 1774, from the testatrix to the testator, for 400*l.* The defendant cravedoyer of the bond and condition. After recital of an intended marriage between *William* and *Charlotte*, the condition was stated to be, that if the marriage should take effect, and *Charlotte* should survive *William*, then *Charlotte* should, within 13 calendar months after the death of *William*, pay to *George* 200*l.* upon trust, for the sole benefit of *Sarah*, the daughter of *William*, (by a former marriage). The seventh plea stated, that on the 23d May, 1791, by a certain writing obligatory *Sarah* became bound to *William* in 490*l.*, subject to a condition that *Sarah* should, during so many years as she should remain deputy keeper of the post-office in Tiverton, pay unto *William* 32*l.* on the 25th day of March yearly, during his life, and after the decease of *William* pay to the executor of *William* 16*l.* yearly during the remainder of the time that *Sarah* should continue in and keep such office. Averment, that *Sarah* remained and continued keeper of the post-office in Tiverton aforesaid during the lifetime of *William*, after the making of the writing obligatory, for five years, until 25th May, 1796; that on 25th March in the same year there was due from *Sarah* to *William* 160*l.*, which is still unpaid; and that *William*, in November, 1815, made his will, and bequeathed all his personal estate to *Charlotte*, and appointed her executrix, and afterwards died; after whose death *Charlotte* proved the will, and assented to the said bequest to herself. Averment, that at the time of the exhibiting of the plaintiff's bill, there was due and owing, upon and by virtue of the writing obligatory mentioned in the declaration and the condition thereof, a certain sum of money, to wit, 200*l.*, and no more; and that before and at the time of the exhibiting of the said bill, there was and

In an action by a trustee to recover a debt for the benefit of the cestui que trust, a debt due from the cestui que trust cannot be set off.



1833.

TUCKER

TUCKER.

still is due and owing to the defendant, as executrix of *Charlotte*, who was executrix of *William*, in trust for the benefit of herself, defendant, as executrix of the said *Charlotte*, for and on account of the said sum of 160*l.* and interest, a large sum of money, to wit, 440*l.*, which sum of money so due and owing upon the writing obligatory of *Sarah*, exceeds the moneys due and owing from the said defendant, executrix as aforesaid, to the plaintiff, executor as aforesaid, upon the writing obligatory mentioned in the declaration, and out of which sum of money so due and owing upon the writing obligatory of *Sarah* the defendant, as executrix, as mentioned in the declaration, is ready and willing, and hereby offers to set off and allow to the plaintiff, as executor as aforesaid, the moneys so due and owing from her as executrix as aforesaid, to the plaintiff, executor as aforesaid.

To this last plea the plaintiff demurred specially, shewing the following causes of demurrer:—That defendant had not in and by that plea shewn how or on what ground 440*l.* in that plea mentioned, became and was due to defendant, as executrix of *Charlotte*, who was executrix of *William*, for and on account of the sum of 160*l.* in that plea mentioned, and interest thereon; and that it does not appear by that plea that any interest was due to the defendant; as executrix of *Charlotte*, who was executrix of *William*, for and on account of said sum of 160*l.*; and that it does not appear in and by that plea that any sum of money equal to the sum due from the defendant, as executrix as aforesaid, to plaintiff, as executor as aforesaid, is due upon the supposed writing obligatory of *Sarah* to the defendant, as executrix of *Charlotte*, executrix of *William*. And that it is not alleged in and by that plea, from whom the said sum of 440*l.* in that plea mentioned, and therein alleged to be due upon the writing obligatory of *Sarah*, is due to the defendant as executrix as last aforesaid. And that it appears in and by that plea, that the supposed debt of 440*l.*, if any such there be, is due to the defendant as executrix

of *Charlotte*, who was executrix of *William Tucker*, and is attempted to be set off against a debt due from the defendant, as executrix of *Charlotte*. And that the said seventh plea attempts to set off against the debt claimed by plaintiff, a debt which cannot by law be set off against it. Joinder in demurrer.


1883,  
  
 TUCKER  
 v,  
 TUCKER.

*Erle*, in support of the demurrer. The principal question on this demurrer is, whether an equitable interest can be treated as a matter of set-off. A mere equitable interest is not matter of set-off, and the plaintiff has no right to treat *Sarah* as the real plaintiff in this action. The cases of *Bottomley v. Brook* (a), and of *Rudge v. Birch* (b), will be cited on the other side. In *Bottomley v. Brook*, which was an action of debt on bond, the defendant pleaded that the bond was given to secure 100*l.* lent to the defendant by *Chancellor*, and was given, by *Chancellor's* direction, to the plaintiff in trust for *Chancellor*, and that *Chancellor*, before the action brought, was indebted to the defendant in more money than the amount of the bond. To this plea there was a demurrer, which is stated to have been withdrawn by the advice of the Court. It is to be observed, that in *Bottomley v. Brook*, that which was the trust arose out of a liability recognized in a court of law. The cestui que trust had a legal cause of action. As to the case of *Rudge v. Birch*, in the later authorities, the Court have regarded with jealousy the doctrine there laid down, and have intimated that they will limit its operation. In *Wake v. Tinkler* (c), which was an action on a promissory note, the defendant pleaded, by way of set-off, a debt due upon a bond given originally by the plaintiff to one *Atkinson*, and assigned by him to the defendant. The Court held the plea bad, and the distinction was taken that the bond was not originally given by the obligee in trust for the defendant. *Bayley, J.* in that case said, "We have nothing to do in this place with any other than legal rights." In *Carpenter*

(a) 1 T. R. 621.

(b) 1 T. R. 622.

(c) 16 East, 36.

1833.  
  
 TUCKER  
 v.  
 TUCKER.

v. *Thornton* (a), the Court would not allow an action to be brought to enforce a mere equitable demand. The matter of the set-off in this case is a mere equitable interest. The bond attempted to be set off is given by *Sarah* to *William*, *William* bequeaths his property to *Charlotte*, and leaves her executrix. *Charlotte* dies and appoints *Emmeline* her executrix. *Emmeline* may be considered as equitably entitled as residuary legatee, but it cannot be considered as a legal debt, more especially until the debts and legacy of *William* are paid, and the produce ascertained. The debt sued for is the debt of *Charlotte*, and the debt attempted to be set off is a debt due to *William*.

An objection arises in another shape. This is an attempt to set off a debt due to *Charlotte* in her representative character, against a demand due from her individually, which cannot be done; *Bishop v. Church* and others (b), *Millisint Shipman v. Thompson* (c), *Gale v. Luttrell* and others (d).

There is also another objection, that interest is claimed upon the arrears of the annuity. Interest is only allowed where there is an express promise in the written instrument to pay interest, or where, from the usage of trade, a promise to pay interest may be inferred. *Higgins v. Sargente* (e), *Page v. Newman* (f), *Wake v. Tinkler* (g).

*Follett*, contra.—It is desirable that the Court should dispose of the principal question, whether this Court will take notice of an equitable interest, so that when the action is brought by or against a trustee, a debt owing by or to the cestui que trust may be set off. It is submitted, in the first place, that this is the rule; and secondly, that this case comes within that rule. The persons interested in this case are *Sarah* and *Charlotte*, and not either the

(a) 3 B. & A. 52.

(b) 3 Atk. 691.

(c) Willes, 103.

(d) 1 Y. & J. 180.

(e) 2 B. & C. 348; S. C. 2

D. & R. 628.

(f) 4 M. & R. 307; 9 B. & C. 378.

(g) *Ante*, and see *Creux v. Hunter*, 2 Ves. sen. 157.

plaintiff or his testator. The action is brought by a trustee against a trustee, and the cestui que trust of each are mutually indebted; and the question is, whether such a debt can be set off. It is true, that in *Scholey v. Mearns* (a), *Marryat* said that the cases of *Bottomley v. Brook*, and *Rudge v. Birch*, had been overruled; and in *Coppin v. Craig* (b) it was also said that *Bottomley v. Brook* had been overruled; but both the cases of *Bottomley v. Brook* and *Rudge v. Birch* were recognized in *Wake v. Tinkler*. In *Webster v. Scales* (c) also, the case of *Bottomley v. Brook* was recognized. In *Winch v. Keely* (d), *Ashhurst, J.* expressly says, "This Court will take notice of a trust, and consider who is beneficially interested." There is another class of cases in which the Court will look at the parties really interested, where goods have been sold by a factor; *Carr v. Hinchliffe* (e). In that case the cases of *Bottomley v. Brook* and *Rudge v. Birch* were cited, and nothing is there said from which it can be inferred that they are not good law. There a factor, with the privity of his principal, had sold goods to a party who did not know that the goods were the property of the principal, and this Court held that in an action by the principal for the price, the buyer might set off a debt due from the factor to him. *Bayley, J.* there says, "Two special causes of demurrer to the plea in question have been assigned. First, that it amounts to the general issue only. Secondly, that the debts are not mutual, unless the factor may for this purpose be identified with the principal. But the cases of *George v. Clagett* and *Barmy v. Corrie*, shew that they may be so identified; that objection, therefore, falls to the ground." The question is, what is the meaning of the expression "identified with the principal." If it mean identified in interest, then that is the case here. The party suing is suing for the benefit of *Sarah*, and the debt intended

1833.

TUCKER  
v.  
TUCKER.


(a) 7 East, 153.

(d) 1 T. R. 623.

(b) 7 Taunt. 243.

(e) 7 D. &amp; R. 42; 4 B. &amp; C. 547.

(c) 1 T. R. 622.

1833.  
  
 TUCKER  
 v.  
 TUCKER.

to be set off is the debt of *Sarah*. The set-off is not claimed in respect of a debt due to *Charlotte* in *auter droit*. The question depends upon the weight the Court will attach to the cases of *Bottomley v. Brook* and *Rudge v. Birch*.

*Erle*, in reply, was stopped by the Court.

DENMAN, C. J.—It is enough to say that this case goes considerably beyond the cases of *Bottomley v. Brook* and *Rudge v. Birch*.

LITLEDALE, J.—I think the cases of *Bottomley v. Brook* and *Rudge v. Birch* are not well decided. In those cases the cross demand was not properly a set-off under the statute, but was rather in the nature of a set-off under the general issue. In the cases cited of principal and factor, one of the parties was the representative of the other, and might have been a party to the suit. There is no setting off one bond against another, except by act of parliament, and the act does not authorize the set-off here attempted to be made.

PARKE, J.—The right of set-off is regulated by act of parliament. The words of the act(a) are, "that where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set off against the other." In this case no legal debt is due from the testator of the plaintiff. Looking at the words of the act of parliament, I am surprised at the decision in the cases of *Bottomley v. Brook* and *Rudge v. Birch*. Those cases having been decided, they are not to be extended. Besides, this case does not fall within either of those cases, and is distinguishable from both of them on the ground stated in the argument.

Judgment for the plaintiff.

(a) 2 Geo. 2, c. 22, s. 13.

1833.

The KING *v.* JOLLIE and another.

IN Hilary term last Sir *J. Scarlett* had obtained a rule nisi to file a criminal information against the defendants for a libel on the Earl of *Lonsdale*, published in several numbers of a newspaper called "*The Carlisle Journal*." The newspapers were published on the 23d of June, the 29th of September, and the 20th and 27th of October, 1832. Hilary term commenced on the 11th of January, and ended on the 31st of January. On the 24th of January notice of the rule was served upon the defendants, who resided at Carlisle. On the 30th of January the rule was further enlarged.

Leave to file a criminal information for a libel should be applied for in a reasonable time before the expiration of the second term after the publication, if it came to the knowledge of the prosecutor early enough to enable him to move within that period.

An affidavit was filed on the part of the prosecution, which stated that the Earl of *Lonsdale* had no knowledge of the libel until the month of January, 1833. On the part of the defendants an affidavit was filed, which stated that the Earl of *Lonsdale* was for some days, in November, 1832, resident at Whitehaven Castle, and that two of his agents frequented a news-room in Whitehaven, at which the *Carlisle Journal* was taken in.

*Aglionby* now shewed cause against the rule. So long a time had been suffered to elapse between the times when the libels were published and the application was made to this Court, that the Earl is not now entitled to the privilege of filing a criminal information. The last of the libels was published in the month of October; and since that period one whole term has elapsed, a quarter sessions has intervened, and the motion for a criminal information was made so late in the second term that the defendants had not time to shew cause; *Rex v. Morice* (a), *Rex v. Marshall* (b). This is attempted to be met by the statement that Lord *Lonsdale* did not know of the publication of the libels until after Michaelmas term; but the circum-

(a) 13 East, 271, in the note.

(b) 13 East, 322.

1833.

~  
The KING  
v.  
JOLLIE.

stances mentioned in the affidavits of the defendants shew that his lordship's agents, who ought to have informed him, must have been aware of the publication. [*Parke, J.* The application must be made within two terms, provided an assize has not intervened; but if it be in the second term, it must be made sufficiently early for the other party to come and shew cause within the same term. This is the rule even in the case of criminal informations against magistrates.] Assuming such to be the rule of the Court, the time to be allowed to a party to shew cause must be a reasonable time. In this case there was not sufficient time allowed to the defendant for that purpose. [*Parke, J.* It is surely sufficient for a party to complain of a libel as soon as he has information of it.] In the case of *The King v. Bishop* (a), the circumstances complained of occurred in 1820, the application was made in Michaelmas term, 1821, but the complainant swore that he had no knowledge of the matter until the 17th of November, 1821; and there the Court refused to make absolute the rule for a criminal information, observing that if they were to admit the excuse of want of knowledge, they should entirely frustrate the very useful rule as to the time within which the application ought to be made.

*F. Pollock*, in support of the rule. It is positively sworn by Lord *Lonsdale* that he had no knowledge of the libels until January. Instances have frequently occurred in which parties have been permitted to file criminal informations for libels contained in books which have been published for a long period of time.

DENMAN, C. J.—The application is not too late. The rule must be made absolute.

LITLEDALE, J.—The rule is, that a party must apply for leave to file a criminal information within the second

term after the publication of the libel, so as to enable the defendant to shew cause within that term. I doubt whether ten days is a reasonable time for a party who resides in the country, at a place so distant as Carlisle, to shew cause. Lord *Lonsdale* had, however, in this case no knowledge of the libel until January, and therefore the application to this Court was made sufficiently early.

PARKE, J. concurred.

Rule absolute (a).

(a) The editors have been favored by Mr. Dealtry, with the following observations upon this case: the cases of *The King v. Taylor*, (Nolan's Reports, 204,) *The King v. Smith*, (7 T. R. 80,) *The King v. Harries*, *The King v. Marshall*, (13 East, 270, 322,) and *The King v. Bishop*, (5 B. & A. 612,) though applicable immediately to informations against magistrates, extend also to other public officers. There has, however,

never hitherto been any distinct rule laid down applicable to other cases. If there has been delay on the part of the applicant, it must be accounted for; (*Rex v. Robinson*, 1 Sir W. Blackstone, 542); and the time, within which the information must be moved for is, to be reckoned from the time the complainant has information of the libel, and not from the period of publication.


1833.  
The KING  
v.  
JOLLIE.

#### DIGBY v. THOMPSON.

CASE for a libel. The declaration, after averring the previous good character of the plaintiff, stated that the defendant, intending to cause it to be suspected and believed that the plaintiff had been guilty of unfair play at cards, and of defrauding persons of their money by means thereof and by bettings, and that he had played unfairly and fraudulently at a certain game with cards called *écarté*, and at certain other games with cards, and had thereby won divers large sums of money from divers persons visiting the house of the plaintiff, at Brighton, in the county of Sussex, and that the plaintiff had invited persons to his house and entertained them there for the purpose of win-

A writing, in which a party is spoken of in language usually applied to the keeper of a gaming-house, is libellous, whether the words are capable of being applied by an innuendo to specific charges of unfair practices or not.



1833.  
  
 DIGBY  
 v.  
 THOMPSON.

ning their money unfairly by gaming there, and that the plaintiff was a person of disreputable and bad character, and did in a great measure support and maintain himself by gaming and by unfair and fraudulent practices in gaming and betting; and to vex, harass, oppress, impoverish, and ruin the plaintiff, on &c. at &c. wrongfully, maliciously and injuriously published in a certain newspaper, called "The Satirist, or, The Censor of the Times," a certain false, scandalous, malicious and defamatory libel of and concerning the plaintiff; containing in a certain part of the said paper the false, scandalous, malicious, defamatory and libellous matter following of and concerning the said plaintiff, that is to say— "King Digby (meaning the said plaintiff), as my friend Tom used to style him, has had a tolerable run of luck this season (meaning thereby that the said plaintiff had won divers large sums of money by gaming); he (meaning the plaintiff) is still here (meaning at Brighton aforesaid), and keeps, I assure you, friend Sat., a well-spread sideboard, but curse the fellow, I always consider myself in a family hotel when my legs are singing duets under his table, for the bill is sure to come in sooner or later, although, as you know, I rarely dabble in the mysteries of *écarté*, or any other game. The fellow (meaning the said plaintiff) is as deep as Crockford, and as knowing as the Marquis. I do dislike this leg-al profession."

In the second count all the innuendos were omitted except those as to the person of the plaintiff.


To the first count there was a special demurrer, stating as causes of demurrer, first, that the matter alleged in the declaration to have been published was not libellous; secondly, that although the plaintiff had by an innuendo alleged that by the words of the libel, "King Digby (meaning the plaintiff) as my friend Tom used to style him, has had a tolerable run of luck this season," the defendant thereby meant that the said plaintiff had won divers large sums of money by gaming, and had alleged as an inducement that the plaintiff was guilty of gaming, nevertheless it

was not alleged that the libel was published of and concerning such gaming, or that such libel had any reference to the matters stated in the introductory part of the declaration or any of them; thirdly, that the meaning and explanation by the plaintiff put upon and given to the words, added to, enlarged and changed their sense, and also that the meaning and explanation is not connected in any way by averment or otherwise with or in any way applicable to the matters of inducement; fourthly, that it is not averred that the defendant was used to employ, or did on the occasion of publishing employ the said words in the sense and meaning put upon them by the plaintiff in the said innuendo. There was a general demurrer to the second count. Joinder in demurrer.

1833.  
  
 DIGBY  
 v.  
 THOMPSON.

Upon this case being called on, no counsel appeared in support of the demurrer. The Court however called upon

*Wightman*, in support of the declaration. The defendant by his demurrer admits that he intended it to be believed that the plaintiff had played unfairly at cards, and had fraudulently cheated at the game of *écarté*. This is an admission that the words of the libel were intended to be used with the meaning which is imputed to them in the declaration. The only question is, whether the words themselves, as appearing upon the record, can bear this meaning. It is sufficient to constitute the words a libel, that they tend to disgrace the plaintiff, or lower him in the estimation of his friends or the world; and whether this be their tendency, is a question that belongs to the consideration of a jury. Even if some of the expressions used should be unintelligible to the Court in its judicial capacity, as of the term *écarté*, or who the *Marquis* or *Crockford* may be, or what is intended by *leg-al*, the jury, after hearing the evidence, would probably understand the allusions. [*Denman*, C. J. There are no words of any kind in which

1833.  
  
 DIGBY  
 v.  
 THOMPSON.

the jury might not discover some hidden meaning.] The cases shew that the Court will, in the case of a libel, take notice of the ordinary meaning in which expressions are used. In *Rolle's Abr.*(a), there is this passage—"Si home dit al un Counciller del ley en le North. Thou art a daffa-down-dilly. Action gist, ove averrment que les parols signifie que il est un Ambedexter." The Court in construing this expression can have derived their information only from considering the sense in which it was employed in ordinary conversation. If the Court can see that by possibility the words will bear the meaning charged, this will be sufficient to entitle the plaintiff to judgment.

DENMAN, C. J.—I look with a good deal of jealousy upon the record, and am unwilling to infer that the defendant has admitted that the words were used in the sense which is imputed to them by the innuendos. I am also unwilling to adopt the rule, that we are to look at what is the meaning in which the words are alleged to have been used as distinct from their ordinary and proper meaning. But upon the general ground that there is in this libel something disgraceful to the character of the plaintiff, in the words themselves, without looking at the previous allegations and the innuendos, I think the declaration may be supported.

LITTLEDALE, J.—It seems to me that the general words are sufficient to constitute a libel, but at the same time I cannot say that you are at liberty to import from the innuendos that all the words were used in the particular meaning there charged.

PARKE, J.—Without saying whether or not Mr. *Wightman* is right in introducing any of the innuendos because of the admission, it appears to me quite clear that the words are libellous; that they do impute to the plaintiff fraudu-

(a) Page 55, pl. 15, title Action sur Case.

lent and dishonourable conduct, and therefore I think that the declaration may be supported.

1833.

DIGBY

v.

THOMPSON.

Judgment for the plaintiff.



DOE, on the several Demises of MOORE and others,  
v. RAMSDEN, Clerk.

**EJECTMENT** for the rectory of Great Stambridge, Essex, on the several demises of *Maria Sarah Moore, John Wilkes, Peter Moore, Samuel Barrett, Moulton Barrett, and John Mendham, and James Gibbons*. At the trial before Lord Lyndhurst, C. B., at the Essex Spring Assizes, 1833, the following facts appeared:

Ejectment may be maintained upon a term duly created, but assigned to the lessor of the plaintiff by a deed defective under the statute of 13 *Eliz.* c. 20.

The defendant was the rector of Great Stambridge, and by a deed dated the 18th February, 1813, in consideration of 1600*l.*, granted to *Elizabeth Fisher* an annuity of 260*l.*; and by the same deed granted a term for 99 years in the rectory, to *Robert Witting*, in trust to secure the payment of that annuity. By a deed dated 6th September, 1816, the defendants, in consideration of 600*l.*, granted an annuity of 93*l.* to *H. J. Shepherd*, and demised the rectory to *Shepherd* for 99 years, to secure the same annuity. By deed of 24th June, 1820, in consideration of 500*l.*, he granted an annuity of 80*l.* to *J. Graves*, and charged it in the vicarage of Little Wakering. By deed of 5th June, 1823, in consideration of 700*l.*, he granted an annuity of 100*l.* to *Bannister Flight*, and granted the rectory and vicarage to *Thomas Flight* for 99 years, in trust to secure that annuity. In the beginning of 1825, the defendant, being desirous of consolidating these annuities and of raising a further sum, applied to the British Annuity Company for the loan of the money necessary for that purpose. They agreed to advance him a sum of 4400*l.* for an annuity of 574*l.* 9*s.* By indenture dated the 19th January, 1825, made

1833.  
  
 Doe  
 v.  
 RAMSDEN.

between the several persons to whom the defendant had previously granted annuities, the British Annuity Company and the defendant, in consideration of 4400*l.* paid by the company, 3555*l.* of which was applied in discharging the former annuities, and the remaining sum of 845*l.* paid to the defendant, the defendant granted to the Company an annuity of 574*l.* 9*s.* The same deed contained an assignment of the several terms in the rectory before mentioned to *John Wilkes*, as trustee for the Company, who subsequently by indenture assigned the same to *James Gibbons* upon the like trust, and a new term for 100 years was created by a demise to *P. Moore*, *S. Barrett*, *M. Barrett*, and *J. Mendham*, for further securing the annuity. In 1826, the annuity became in arrear, and the Company issued a sequestration. In November, 1831, an application was made by the defendants to set aside the sequestration, and in January, 1832, the Court ordered that it should be set aside, and referred it to the Master to take an account of the sums received by the plaintiffs and the arrears of that annuity, and that if a balance was due to the defendant, the same should be paid to him. These accounts were unsettled at the time the action was brought, but it was proved that a balance of 50*l.* 18*s.* 7*d.* was due to the Company. It was contended, on the behalf of the defendant, that the plaintiff should be nonsuited, since the Court of King's Bench had declared that the deed of 1825, so far as respected the personal covenant, was void, so as to prevent the parties from issuing a sequestration, and therefore it could not be available to support the present ejectment: the learned judge, however, directed the jury to find a verdict for the plaintiff, but gave the defendant leave to move to enter a nonsuit. The jury accordingly found a verdict for the plaintiff.

*Comyn* now moved for a rule nisi accordingly, on the ground of misdirection. There are two questions in this case. The first, whether this ejectment can be supported by the two terms which were granted in February, 1813,

and September, 1816. The second question is, whether the Company can maintain this ejectment upon the supposed balance, as shewn by themselves, the matters in difference respecting these annuities having been referred to the master, and he not having made his report. The rule is laid down in *Newland v. Watkin*(a), that if the deed granting the annuity, upon the face of it expressly charges the living, it is void. This deed was void, and therefore it could not operate as an assignment of the term. [*Parke, J.* Is not this like the case of *Doe v. Gully*(b)?] There is this distinction, that in *Doe v. Gully* the terms were not satisfied. [*Parke, J.* How satisfied? They were assigned in trust only, and not absolutely.] The object of the statute was to prevent new charges on benefices. There is a recital in this deed that the old annuities should be paid off, and that the annuity was granted in consideration of a sum received, part of which was raised to pay off a former annuity. [*Parke, J.* That is precisely similar to the case of *Doe v. Gully*. There the 600*l.* was raised to pay off a former annuity. The Court held that the new charge was invalid, but that the assignment of the term was valid. The case is quite in point: there can be no doubt upon the question.]

The next question is, whether the ejectment could be maintained upon the two terms of 1813 and 1816, until the Master had made his report upon the state of the accounts. [*Parke, J.* The legal estate is in the termor, and he of course must have a right to enter.]

By the COURT.

Rule refused.

(a) 2 Moore & Scott, 174; and 9 Bingh. 113.

(b) 4 Mann. & Ryl. 249; 9 B. & C. 344.

1833.

RICHARD CLARK, Chamberlain of the City of LONDON,  
v. WHISTON POWELL.

A stock-broker is a broker within 6 *Anne*, c. 16, and must be admitted by the Lord Mayor and Aldermen.

THIS was an action of debt for three penalties of 100*l.* each, for acting within the city of London as a broker, not being admitted by the Court of Mayor and Aldermen of the said city to be a broker, or to act as a broker within the said city and the liberties thereof. The defendant pleaded the general issue. At the trial before Lord *Tenterden*, C. J. at the sittings after Trinity term, 1830, at the Guildhall, London, the question was, whether a stock-broker is within the meaning of the act of parliament 57 *Geo.* 3, c. 60, and the jury found a special verdict for one penalty of 100*l.*, to the following effect.

That since the making of a certain act of parliament of 6 *Anne*, and also since the making of a certain other act of parliament of 57 *Geo.* 3, divers persons have taken upon themselves to act within the city and liberties of London in buying and selling public and joint stock, and government annuities, transferable at the Bank of England, and other public securities for others, for reward, in that behalf, such persons not having been admitted by the Court of Mayor and Aldermen of the said city to be brokers, in pursuance of the said act of 6 *Anne*; and that divers other persons have taken upon themselves so to act, and have been admitted by the said Court to be brokers and to act as brokers, and such persons have been and are upon their admission, required to execute the broker's bond of the city of London, the form of which bond, used prior to A. D. 1828, is marked A., and the form of the bond since and now used is marked B. And that since the 27th June, 1817, within the city of London, the defendant *did for reward purchase* for J. J., of N. W., a share amounting to 50*l.*, in a certain public joint stock government annuity, transferable at the Bank of England, (that is to say,) in the capital or joint stock called the *Reduced Three per Centum*

*Annuities*, and procured it to be transferred, and received from *J.*, as a reward and commission for such purchase and transfer, 1s. 3d.(a). And that the defendant was not at that time admitted by the Court of Mayor and Aldermen to be a broker, or to act as a broker within the said city and liberties thereof, nor had he obtained any admission by or from such Court.

The bond referred to as marked *A.*, was in the penalty of 500*l.*, conditioned as follows:—That the party whose admission is recited, should faithfully execute his office and employment without fraud, and should upon every contract, bargain or agreement made by him, declare the name of his principal if required by the other party; and should keep a broker's book and fairly enter all such contracts &c., within three days, and shall, upon demand of either party, produce such entry and prove the truth and certainty of such contracts &c.: and for satisfaction of all such persons as shall doubt whether he is a lawful and sworn broker, shall produce a certain medal, "and shall not directly or indirectly, by himself or any other, deal for himself or any other broker in the exchange or remittance of money, or in buying any tally or tallies, order or orders, bill or bills, share or shares, or interest in any joint stock to be transferred or assigned to himself or any broker, or to any other in trust for him or them, or in buying any goods, wares, and merchandises to bargain or sell again upon his own account or for his own or for any other broker's benefit or advantage, or to make any gain or profit in buying or selling any goods over and

(a) The amendment agreed to be made in the course of the argument was, as it is understood, introduced in this place, and is in the following words: "And the jurors aforesaid, upon their oath aforesaid, further say, that the said defendant did from time to

time, both before and since the said 27th day of June, on various occasions buy divers shares in the government securities transferable at the Bank of England for divers other persons, for reward, in that behalf in manner above stated."

1833.  
CLARK  
v.  
POWELL.



1833.

CLARK

v.

POWELL.

above the usual brokerage;" and shall discover any person whom he shall know to be acting as broker not being duly authorized, and shall not employ any one under him to act as a broker not being duly admitted; "and shall not presume to meet and assemble in Exchange Alley or other public passage or passages within the city and liberties thereof, other than upon the Royal Exchange, to negotiate his business and affairs of brokerage to the annoyance or obstruction of any of his majesty's subjects or any other in their business or passage about their occasions."

The form of bond referred to as marked B., was in 1000*l.* and conditioned as the former bond, except that there was a condition for giving either to the buyer or seller, within 24 hours after demand, a contract note, containing therein a true copy of the entry to be made in the "broker's book," and that the stipulation respecting the assembling in Exchange Alley or other public places was entirely omitted.

*Follett* for the plaintiff. The question for the determination of the Court upon this special verdict is, whether or not a stock-broker is a broker within the meaning of 57 *Geo. 3*, c. lx. s. 2, (a). The first act relative to the subject is the 6 *Anne*, c. 16; the 4th section of which provides, that all persons that shall act as brokers within the city of London and liberties thereof, shall from time to time be admitted so to do by the Court of Mayor and Aldermen of the said city for the time being, under such restrictions and limitations for their honest and good behaviour as that Court shall think fit and reasonable. The 5th section enacts, that if any person shall take upon him to act as a broker within the said city and liberties, not being admitted as aforesaid, every such person so offending shall forfeit and pay to the use of the said mayor and commonalty and citizens of the said city, for every such offence, the sum of

(a) Local Act.

25*l.* The 57 *Geo.* 3, c. 60, s. 2, repeals so much of the statute of *Anne* as imposes a penalty of 25*l.* upon any person who shall take upon him to act as a broker, not being admitted in pursuance of the said act, and increases the penalty to 100*l.*, to be recovered by action of debt, in the name of the chamberlain of the city, in any of his majesty's Courts of record. The question, therefore, turns upon the construction to be given to these acts. [*Parke, J.* The question as upon the statute of 6 *Anne*, has been decided by the case in the fourth volume of *Burrow's Reports* (a).] It has, and the authority of that case was recognised in *Gibbons v. Rule* (b), which it is understood will be relied on upon the other side. There it was decided that a ship-broker was not a broker within the act. Looking at the judgment of *Best, C. J.*, in that case, it is clear that this distinction was taken, that a broker to be within these acts must be a person who buys and sells for another, and that the business of a ship-broker is not to buy and sell for another; and upon this distinction the judgment was founded. The definition given in *Johnson's Dictionary* of the meaning of the word broker, is "one that does business for another." This is a general term undoubtedly applying to both buying and selling and doing other business. In *Gibbons v. Rule* several definitions of the term broker are referred to in the judgment. It is there said, "In *Jacob's Dictionary* brokers are described as those who make bargains in matters of money or merchandise, and he enumerates exchange brokers, corn brokers, and pawnbrokers." In *Blunt's Law Dictionary* we find, "Exchange brokers—mediators in any contract of buying and selling contracts of marriage and pawnbrokers." In *Cowell* the same description; but he adds, "that pawnbrokers are not of the same antiquity as the others." The first act of parliament, except a very old one

1833.

CLARK  
v.  
POWELL.

(a) *Jannsen Burt*, Chamberlain of London, v. *Green*, 4 Burr. 2103.

(b) 4 Bing. 301.

1833.

CLARK  
v.  
POWELL.

in the time of 13 *Edw.* 1 (a), which gives the city of London the power of admitting brokers, is the act of 1 *Jac.* 1, c. 21. It will be urged on the other side, that at the time of passing the statute of 6 *Anne*, there were no stocks transferable in the Bank of England precisely of the same nature as those now transferable. This may be true; but in the time of Queen *Anne* there were government securities that were transferable. Suppose that since that time a new species of merchandise had been introduced, is it to be said that brokers who deal with such merchandise are not brokers within the statute of *Anne*? The 8 & 9 *W.* 3, c. 20, is entitled "An act for making good the deficiencies of several funds therein mentioned; and for enlarging the capital stock of the Bank of England; and for raising the public credit:" from which it appears that it is an act confined exclusively to public securities; and the 60th section imposes a penalty upon every person employed as a *broker*, solicitor or otherwise, in the behalf of any other person, to make or drive any bargain or contract for the buying or selling of any of the said orders or tallies, who shall take for brokerage, or making such contract or bargain, more than 2s. 6d. per cent. Then follows another penalty of 500*l.*, in case such *broker* &c. shall commit another offence there mentioned. From this it appears that government securities were transferable from hand to hand, though not precisely in the same form as at present; and it also appears by this act that the legislature, before the passing of the act of *Anne*, used the term "*broker*" as applying to a person buying and selling public securities. The first statute which imposed any penalty upon brokers acting without licence, was the 8 & 9 *W.* 3, c. 32, which existed only three years, and was succeeded in its provisions by the statute of *Anne*. The 8 & 9 *W.* 3, c. 32, contained an express provision that no person should act as a broker in respect of any bank stock or any tallies, bills of credit, or tickets payable at the Exchequer or at any of the public offices, who has

(a) Stat. 5.

1835.  
  
 CLARK  
 v.  
 POWELL.

not been admitted a broker of the city of London. The 5th section of the act, by which various penalties are imposed, uses 'broker' and 'stock-broker,' as convertible terms. By an act of 10 *Anne* (a), a penalty is imposed upon every person who shall be employed as a *broker*, solicitor, or otherwise, in the behalf of any other person, to make any bargain or contract for the buying or selling of any tallies, orders, exchequer bills, exchequer tickets, bank bills, or any share or interest in any joint stock created by act of parliament or by letters patent under the great seal, or bonds of any company thereby erected, who shall take any reward exceeding 2s. 9d. per cent. It will be seen from the expression "buying or selling of any tallies &c.," in what sense the legislature used the word "broker." It is said that the stock which is now transferable in the Bank of England, was not created until the 7 *George* 1 (b). By the 6 *George* 1 (c), penalties are inflicted on persons acting as brokers in the buying or selling of any share or interest in any of the undertakings thereby declared to be unlawful, or in any stock or pretended stock of such undertakers. This act does not allude to government stock, but in it the word 'broker' is used as a person buying or selling for another any stock or pretended stock. From all these acts it appears that the legislature has used the word broker without distinction, as descriptive of a person who dealt in merchandise, in transferable stock of private companies, or in government funds. The 8th section of the stock jobbing act (d), imposes a penalty upon *brokers* or agents who shall negotiate, transact, or intermeddle with the making of any contracts for the sale or transfer of 'any public or joint stock or stocks or other public securities whatsoever,' knowing that the seller is not possessed or entitled to such stock. Thus after the statute by which it is said the present public transferable securities were created, a broker is spoken of by the legislature

(a) C. 19, s. 121. (b) C. 26. (c) C. 18, s. 21. (d) 7 *Geo.* 2.

1833.  
  
 CLARK  
 v.  
 POWELL.

as a person negotiating or transacting the sale and transfer of public stocks or securities. *Janssen v. Green* (a), which was an action for penalties under the 6th of *Anne*, is a distinct authority for the plaintiff. There the question was, whether a person who for brokerage and hire negotiates and concludes bargains for stock, is a broker within the statute of the 6th of *Anne*. *Wallace*, for the defendant, contended, that a person negotiating the transfer of stocks for hire was not within the description in 1 *Jac.* 1, c. 21; and he argued also, that the brokers of stock mentioned in the last clause of 8 & 9 *Will.* 3, were only brokers dealing in stock at that time existing; whereas the stock in which the defendant had dealt had been created subsequently to both 8 & 9 *Will.* 3, and 6 *Anne*. Lord *Mansfield*, C. J. and the rest of the Court were, however, of opinion that the stock-jobbing act (b) was conclusive as to what was the idea which the parliament had of the word "broker," for that there it is said, "that every broker or other person who shall negotiate or act as a broker, receiving brokerage in the buying and selling or otherwise disposing of any of the said public or joint stocks, or other public securities, shall keep a book which shall be called the *Broker's Book*." [*Parke*, J. We may hear the other side.]

*Campbell*, S. G. contra. It is submitted that the city of London have no jurisdiction for the regulation of stock brokers; but that this is a matter of general concern, regulated by general acts of parliament. The 7 *Geo.* 2, which has been referred to (c), provides ample means for the protection of the public against the frauds of stock-brokers, and solicitors, and agents, who deal in stock, without extending the provisions of the act of *Anne* to persons who clearly cannot have been in the contemplation of the legislature at the time when the act passed.

It is a rule of law that all penal acts are to be strictly

(a) 4 *Burr.* 2103.

(c) *Suprà*.

(b) 7 *Geo.* 2, c. 8, s. 9.

construed; but this act of *Anne* ought to be construed with more than ordinary strictness. It is not only penal, but it imposes a tax upon one class of individuals, without giving any equivalent, avowedly for the sole purpose of indemnifying other individuals, who had sustained losses, in consequence of certain regulations, which the legislature thought proper to make respecting a particular branch of commerce. The act is entitled "An Act for the repealing the act of 1 *Jac.* 1, entitled An Act for the well garbling of Spices, and for granting an equivalent to the City of London by admitting Brokers." Upon reference to the Journals of the House of Commons it appears that the bill was originally introduced for the first purpose mentioned in the title, and that it was after the bill had been read a second time, that upon petitions of the city of London and one *William Stewart* (garbler of spices), stating that their respective interests would be affected, the fourth and fifth sections were added, imposing upon brokers, without defining them, a tax, in return for which it was not pretended to give them any equivalent, nor is it at all pretended that the regulations were introduced with a view of protecting the public. This act gives to the city 40s. on admitting a broker, and 40s. every year afterwards, which moneys are directed to be applied, first, in compensating *W. Stewart*, and afterwards for the benefit of the mayor &c. of London. The statute of 57 *Geo.* 3, is similar in its nature. It is entitled "An Act for granting an equivalent for the diminution of the profits of the office of Gauger of the City of London, and increasing the payments to be made by Brokers." The first section recites, that the mayor and commonalty and citizens of London, and *N. B. Harrison* (deputy gauger), had, owing to the completion of the West India docks and London docks, and the parliamentary regulations concerning them, sustained considerable loss from the diminution of the profits of the office of gauger within the city of London, and then proceeds: "And whereas it is just and expedient that some compensation should be

1833.  
  
 CLARK  
 v.  
 POWELL.

1833.

CLARK  
v.

POWELL.

made to the administrator of the said *N. B. Harrison* and the said mayor, &c. for the diminution of the profits of the said office." The act then recites the statute of *Anne*, its title, object, and provisions respecting brokers, and then enacts, "that all persons who should thereafter be admitted as brokers in pursuance of the recited act, should, in addition to the sum of 40s., pay to the chamberlain 3*l*. on admission, and also the annual sum of 3*l*. in addition to the yearly sum of 40s. required to be paid by the former act. All which sums are to be enjoyed by the mayor, &c. of London, subject to the payment of compensation to the administrator of *Harrison*." Then the second section repeals the 6th of *Anne*, and increases the penalty for acting as a broker, without admission, to 100*l*. The Court will, under these circumstances, construe this act with the greatest strictness.

The question must be, whether, upon the facts found, it is quite clear that the defendant is a broker within the statute of *Anne*, for the 57 *Geo. 3* clearly does not embrace any persons but such as were brokers within the provisions of the former statute. The 6th *Anne* does not define a broker. The Court may undoubtedly look at other acts of parliament in order to see what persons it is probable that the legislature contemplated when they required brokers to be admitted by the city of London. The Court cannot take 'broker' in its common vulgar acceptance. One of the definitions of a broker to be found in *Johnson's Dictionary*, has been mentioned; another is 'a dealer in old furniture.' Neither will the Court adopt the mercantile acceptance or use of the word broker, for there are various persons called by them brokers who are certainly not within the meaning of the statute, as ship-brokers, whose case has been decided in *Gibbons v. Rule (a)*, and also, as it is believed, insurance brokers.

Here the facts appearing in this special verdict only

(a) 4 Bingham, 301.

shew that the defendant acted as the agent of one *Johnson*, in the purchase of 50*l.* three per cents. He was not buying and selling for others. Such a broker as is intended by the statute of *Anne*, is a middle man employed by buyer and seller, who makes the bargain between them, and is the common agent of both. The defendant was not the agent of both. For any thing that appears here, the seller of the stock may have acted personally and individually.

If the nature of the article bought and sold is immaterial, it would follow that an insurance broker is within the act, since he buys and sells for others; and for a premium purchases a contract of indemnity; or that an attorney who buys and sells for others the grant or the assignment of an annuity is within the meaning of the act. Yet what is stock but an annuity? If the amount bought had been 100*l.*, there would have been a purchase of an annuity of 3*l.* That it is an annuity paid by government and not by an individual, does not affect the analogy. None, it is apprehended, can be a broker within the meaning of the act, but one who deals in some tangible, visible commodity which is capable of delivery, and which will clearly give a right of action, as goods and chattels, or bills of exchange. Now it has been frequently held, that the public securities are not goods and chattels. In the statute of 1 *James* 1, c. 21, entitled "An Act against Brokers," (meaning pawnbrokers) which has been cursorily referred to, the true definition may perhaps be found. The preamble states, that "Forasmuch as of long and ancient times, certain freemen have been presented to the mayor and aldermen as persons of approved honesty, fit to be brokers, and have been thereupon allowed by the mayor and aldermen to be brokers within the said city, and have therefore taken their oaths 'to use and demean themselves uprightly and faithfully between merchant English and merchant strangers and tradesmen in the contriving, making, and concluding bargains and contracts to be made between them concerning their wares and merchandises to be

1833.  
CLARK  
v.  
POWELL.



1833.

RICHARD CLARK, Chamberlain of the City of LONDON,  
v. WHISTON POWELL.

A stock-broker is a broker within 6 *Anne*, c. 16, and must be admitted by the Lord Mayor and Aldermen.

THIS was an action of debt for three penalties of 100*l.* each, for acting within the city of London as a broker, not being admitted by the Court of Mayor and Aldermen of the said city to be a broker, or to act as a broker within the said city and the liberties thereof. The defendant pleaded the general issue. At the trial before Lord *Tenterden*, C. J. at the sittings after Trinity term, 1830, at the Guildhall, London, the question was, whether a stock-broker is within the meaning of the act of parliament 57 *Geo.* 3, c. 60, and the jury found a special verdict for one penalty of 100*l.*, to the following effect.

That since the making of a certain act of parliament of 6 *Anne*, and also since the making of a certain other act of parliament of 57 *Geo.* 3, divers persons have taken upon themselves to act within the city and liberties of London in buying and selling public and joint stock, and government annuities, transferable at the Bank of England, and other public securities for others, for reward, in that behalf, such persons not having been admitted by the Court of Mayor and Aldermen of the said city to be brokers, in pursuance of the said act of 6 *Anne*; and that divers other persons have taken upon themselves so to act, and have been admitted by the said Court to be brokers and to act as brokers, and such persons have been and are upon their admission, required to execute the broker's bond of the city of London, the form of which bond, used prior to A. D. 1828, is marked A., and the form of the bond since and now used is marked B. And that since the 27th June, 1817, within the city of London, the defendant *did* for reward purchase for J. J., of N. W., a share amounting to 50*l.*, in a certain public joint stock government annuity, transferable at the Bank of England, (that is to say,) in the capital or joint stock called the *Reduced Three per Centum*

*Annuities*, and procured it to be transferred, and received from J., as a reward and commission for such purchase and transfer, 1s. 3d.(a). And that the defendant was not at that time admitted by the Court of Mayor and Aldermen to be a broker, or to act as a broker within the said city and liberties thereof, nor had he obtained any admission by or from such Court.

The bond referred to as marked A., was in the penalty of 500*l.*, conditioned as follows:—That the party whose admission is recited, should faithfully execute his office and employment without fraud, and should upon every contract, bargain or agreement made by him, declare the name of his principal if required by the other party; and should keep a broker's book and fairly enter all such contracts &c., within three days, and shall, upon demand of either party, produce such entry and prove the truth and certainty of such contracts &c.: and for satisfaction of all such persons as shall doubt whether he is a lawful and sworn broker, shall produce a certain medal, “and shall not directly or indirectly, by himself or any other, deal for himself or any other broker in the exchange or remittance of money, or in buying any tally or tallies, order or orders, bill or bills, share or shares, or interest in any joint stock to be transferred or assigned to himself or any broker, or to any other in trust for him or them, or in buying any goods, wares, and merchandises to bargain or sell again upon his own account or for his own or for any other broker's benefit or advantage, or to make any gain or profit in buying or selling any goods over and

(a) The amendment agreed to be made in the course of the argument was, as it is understood, introduced in this place, and is in the following words: “And the jurors aforesaid, upon their oath aforesaid, further say, that the said defendant did from time to

time, both before and since the said 27th day of June, on various occasions buy divers shares in the government securities transferable at the Bank of England for divers other persons, for reward, in that behalf in manner above stated.”

1833.

CLARK  
v.  
POWELL.

1833.

CLARK  
v.  
POWELL

discussion agreed that the special verdict should be amended by the introduction of such words as would be sufficient to raise upon the record the general question, whether a stock-broker is a broker within the purview of the statute of *Anne*.)

One of the conditions of the bond which brokers are compelled to enter into was, until the year 1818, that they should carry on their business in the Royal Exchange, and not in Change Alley. This would be to prevent stock-brokers from carrying on their business; for it is well known that the Stock Exchange was, at the time when the city of London procured the act of 6 *Anne* to be passed, and is now, the place of business for dealing in stock, and not the Royal Exchange. This would shew that the city of London did not suppose that stock-brokers were to be included in the act. [*Taunton, J.* Non constat that the bargains in stock transactions were made in the 6th of *Anne* in any place but the Royal Exchange. We cannot take notice that there was any such place as a stock exchange at that time]. It is matter of history well known. [*Parke, J.* The Stock Exchange is a mere private society—a club of stock-brokers; there are some stock-brokers who are not members of the Stock Exchange]. It is known that stock is not bought and sold in the Royal Exchange. [*Parke, J.* We do not know that. *Taunton, J.* The words of the condition of the bond are, not that he shall not carry on business on the Stock Exchange, but “that he shall not presume to meet and assemble in Exchange Alley, or any other public passage or passages within the city and liberties thereof, other than upon the Royal Exchange, to negotiate his business and affairs of brokerage, to the annoyance and obstruction of his Majesty’s subjects.” It seems rather to be a provision to prevent passages from being blocked up by brokers than any thing else]. The bond contains other provisions, tending to shew that a stock-broker was not contemplated. One of the conditions prevents the broker from dealing in the commodity as principal, in which he deals as broker. This may be a

good regulation to impose upon one who buys and sells merchandise for another, but it would be unreasonable to say that a stock-broker shall not himself be the purchaser of stock for his own use, or that he shall not sell it if he had happened to possess it before he became a broker. [*Littledale, J.* It does not seem to me that the particular conditions of the bond at all affect the question whether a stock-broker comes under the penal clauses or not. *Parke, J.* Any objections to the bond are only objections to the mode in which the city exercise their jurisdiction. They have a right to make such regulations as they think useful.] With respect to the class of stock-brokers, such provisions are made by a general law as the legislature have thought necessary for their good governance; and it would be inconsistent with that general law to subject them "to such restrictions and limitations for their honest and good behaviour as the court of aldermen shall think fit and reasonable." [*Littledale, J.* If a person wished to become a stock-broker, and applied to the court of aldermen to be admitted, and they required him to sign a bond to some of the conditions of which he objected, and he tendered a bond, leaving out those clauses which he considered unreasonable, might he not come to this Court for a mandamus to admit him, and then bring the question before this Court whether they can impose any such conditions?] It is in their discretion, "as that Court shall think fit and reasonable." [*Parke, J.* It is presumed that they will not, in their discretion, make improper regulations. If they should, it is in the power of others to compel them to make proper regulations. There is no general regulation of stock-brokers in the act alluded to: a penalty is imposed upon them for not keeping books, that is all, which penalty the court of aldermen could not have imposed. *Taunton, J.* That act contains no code of general law for the trade of stock-brokers, it only regulates them in one or two particulars]. It is probable that these

1833.

CLARK  
v.  
POWELL.

1833.  
 CLARK  
 v.  
 POWELL.

are all the regulations which the legislature felt to be necessary. By the bond which brokers give to the city of London, brokers are liable to a penalty for not keeping books; and if it had been thought that stock-brokers were under the regulation of the civic authorities, as brokers, it would not have been necessary to introduce a regulation requiring them to keep books. [*Parke, J.* The bond can only be enforced by the mayor and aldermen; the penalty may be enforced by a common informer]. Any fresh provision seems unnecessary.

There is another consideration, that to impose a tax on those who deal in the public securities would be contrary to the act of parliament, which says, that the transfer of parliamentary securities shall be free and open, and subject to no tax whatever, 9 & 10 *W. 3*, c. 44. So in 5 *Anne*, c. 19, s. 19; 8 *Anne*, c. 7; 1 *Geo. 1*, c. 19; and it is believed in every other tax act.

At the period of 6 *Anne* there were no perpetual transferable annuities in the Bank of England until the 6 *Geo. 1*. Loans were contracted for in a totally different manner. Sums of money were raised upon tallies; what is now understood by the funded debt of the country was then unknown. It might perhaps be admitted that dealing in tallies came within the act of *Anne*: they were in the nature of bills of exchange: they were securities, on producing which payment might be demanded, and therefore a person who dealt in them for others might be considered as a broker of a negotiable bill. But the funds created by 1 *Geo. 1*, c. 19, are only perpetual transferable annuities transferable at the bank. It is asked whether a broker who dealt in some new commodity would not be within the act? Certainly, if it were ejusdem generis, but that is not the case here. This is not merchandise. It is neither tangible, nor capable of delivery.

*Janssen v. Green*, and *Gibbons v. Rule*, appear to be the only two cases which have arisen in this act. In the one, the judgment is by no means satisfactory; and in the

other all that is decided is, that all persons who are generally called brokers are not brokers within the meaning of the act.

With regard to the alteration of the special verdict, it can make no difference whether the defendant acted once or any number of times in the purchase and sale of stock for others, for unless each individual act constitutes him pro tanto a broker, a series of such acts will not make him so.

*Follett* was about to reply, but

*Per Curiam*.—You may amend the special verdict, and then we will see whether it is necessary to hear you again.

In the course of this term judgment was delivered by

LITLEDALE, J.—This case, which was argued before my brother *Parke* and myself in the course of last Michaelmas term, stood over, in order that the special verdict might be amended. This has been done, and the question upon the amended record is, whether a person who, on various occasions, buys shares in the government securities, transferable at the Bank of England, for other persons for reward, (in ordinary parlance a stock-broker), is within the provisions of the 6 *Anne*, cap. 16, and the 57 *Geo. 3*, cap. lx. and is under the latter act liable to penalties for acting as such stock-broker in London, without having been admitted by the mayor and aldermen of the city of London.

The first of these acts abolishes the office of garbler of spices, by repealing the statute of *James 1*, and gives an equivalent to the city by a payment upon the admission of brokers. The fourth section is as follows:—"That from and after the determination of this present session of parliament, all persons that shall act as brokers within the city of London and liberties thereof, shall from time to time be admitted so to do by the court of mayor and aldermen of the said city for the time being, under such restrictions and

1853.

CLARK

v.

POWELL.

1833.

CLARK

v.

POWELL.

limitations for their honest and good behaviour as that court shall think fit and reasonable, and shall, upon such their admission, pay to the chamberlain of the said city for the time being, for the uses hereinafter mentioned, the sum of forty shillings, and shall also yearly pay to the said uses the sum of forty shillings, upon the nine-and-twentieth day of September in each year. The fifth section provides, that if any person shall take upon himself to act as a broker within the city and liberties, not being admitted as afore-said, he shall forfeit and pay the sum of 25*l.*, to be recovered by action in the name of the chamberlain of the city. The other of these acts, the 57 *Geo.* 3, cap. lx. was passed for granting an equivalent for the diminution of the profits of the office of gauger of the city by the construction of the London Docks, and for increasing the payment to be made by brokers. It raises the fee on admission, increases the annual payment of admitted brokers to 5*l.*, and makes the penalty on a person for taking upon him to act as a broker 100*l.* The very question now raised by the record was decided by the Court of King's Bench upon a special case in *Janssen v. Green* (a), and by that decision we ought to be bound, unless we are clearly satisfied that it is contrary to law. The question has been fully and elaborately argued before us, and in the result we see no reason to think that the decision was wrong. It was very strongly urged by the Solicitor-General, that the clause in the statute of *Anne*, which enacts that all persons who shall act as brokers within the city of London, shall be admitted and pay the sums therein mentioned, ought to be strictly construed, as it imposes a tax, and *that* upon persons who derive no advantage from the abolition of the office for which the payments are given as a compensation. The act, however, besides the imposition of a tax, appears also to have had in view the regulation of brokers, and to have secured and enforced the ancient right of the city to

(a) 4 Burr. 2103, *suprà*.

admit brokers, which, by the Statuta Civitatis Londini, 13 *Edward* 1, it appears to have possessed in the earliest times. But supposing that such a strict construction ought to prevail, because the act imposes a tax for the benefit of an individual and the corporation, it is clear that the statute extends to all persons who shall act as brokers; and the question is, what persons fall within that description. All who do are equally liable to the tax, and are all alike taxed, without any corresponding benefit; for the abolition of the office of garbler appears to have conferred no more benefit on one class of brokers than another. As the legislature has imposed the burthen upon all brokers, all that we are judicially satisfied were intended to be included within that denomination must bear it. In order to ascertain who these are, the statutes, and particularly those which were passed about the time with the act in question, furnish us with the best means of information. The 1 *Jac.* 1, c. 21, recites that persons have been admitted as brokers who have taken their oaths on admission to use and demean themselves uprightly between merchant English and merchant strangers and tradesmen, in contriving, making, and concluding bargains and contracts to be made between them concerning their wares and merchandises to be bought and sold, and contracted for within the city of London, and monies to be taken up by exchange between such merchants and merchants and tradesmen; and that this kind of persons have had and borne the name of brokers, and were known, called, and taken for brokers. The act proceeds to declare that persons who buy and sell, and take pawn of garments, &c., are not brokers but fripperers, and to provide a remedy against illegal pledges; and the last clause provides that nothing in the act contained shall be prejudicial to the ancient trade of brokers between merchant and merchant, or other trader or occupiers within the city, being selected as therein mentioned. Though this was the occupation of regular brokers at that time, it is obvious that when a new subject of deal-

1833.

CLARK  
v.  
POWELL.



1833.

CLARK  
v.  
POWELL.

ing was created in government securities, that those who dealt in the same way respecting such securities might fall under the same denomination. The class of men who dealt either partially or exclusively in this new description of security might as readily fall within the description of brokers as those who dealt partially or exclusively in some new description of merchandise. That this was so the statutes passed in the reign of King *William* clearly and decisively prove. The 8th & 9th *W. 3*, cap. 20, sec. 60, mentions *brokers* employed on the behalf of other persons to make bargains and contracts for the buying and selling of orders of the treasury, and of tallies, which are described in the 57th section, and limits their brokerage to 2s. 6d. per cent. The 8 & 9 *W. 3*, cap. 32, a temporary act, entitled "An Act to restrain the number and ill practice of Brokers and Stock Jobbers," after reciting that for the conveniency of trade sworn brokers had been anciently admitted within the city of London for the making and concluding of bargains and contracts between merchant and merchant, and other tradesmen, concerning their goods, wares, merchandises, and invoices taken up by exchange, and for negotiating bills of exchange between merchant and merchant, and that brokers, stock-jobbers, or pretended brokers, had latterly carried on most unjust practices in selling and discounting tallies, bank stock, bank bills, shares and interest in joint stock, and other matters and things, and have combined to raise and fall, from time to time, the value of such tallies, &c., which was a great abuse of the said ancient trade and employment, and that the number of such brokers and stock-jobbers had very much increased within a few years, by reason that they were not under such regulations as were necessary to prevent the mischief aforesaid; for remedy provides, that no person or persons whatsoever should directly or indirectly use or exercise the office, trade, mystery, occupation, or employment of a broker, or act or deal as such within the cities of London or Westminster, borough of Southwark, and within the limits of

the weekly bills of mortality, in the contriving, making, or concluding of bargains or contracts between merchants and merchants, or between merchants and merchants and tradesmen, or others, concerning their wares or merchandises to be bought and sold or contracted for, or concerning any tallies or securities upon any fund or funds granted by parliament, &c., unless they should first be admitted, lincensed, approved and allowed by the lord mayor and court of aldermen for the time being, upon such certificate of their ability, honesty, and good fame, as had been usual. The act then proceeds to direct the oath, to limit the number of brokers, to regulate the fee on admittance, (not to exceed 40s.) to impose a penalty of 500*l.* upon all those who should use the trade of brokers, and to provide that if any person, not being a sworn broker, who should directly or indirectly use or exercise the said office, trade, mystery, occupation, or employment of a broker, or act or deal as a broker, not being admitted, sworn and approved of, according to the true intent and meaning of the said act, such person so offending shall forfeit 500*l.*, over and above all other forfeitures that such person should any ways incur by virtue of the said act. The act proceeds to make further regulations for keeping of books of account of brokers, for limiting them to 10*l.* per cent. brokerage, and other matters; and also requires brokers who buy or sell tallies, or securities in funds granted by parliament, to be licensed by the treasury. This act was limited to three years. In the 6 *Geo.* 1, c. 18, sec. 21, (passed 12 years after the statute of *Anne*.) a penalty is imposed on brokers buying and selling shares in illegal undertakings. The 7 *Geo.* 2, c. 8, sec. 8, mentions brokers with reference to transactions of buying and selling stock. Considering the provisions of these statutes passed recently before and after the passing of the statute of the 6 *Anne*, it appears to us that persons buying and selling government shares and securities for others were considered as brokers at that time, and must fall under that description in the statute in question. If brokers dealing

1883.


  
CLARK  
2.  
POWELL.

1833.  
  
 CASE  
 v.  
 POWELL.

in government stock then existing were so included, it does not admit of a doubt that those who dealt in all subsequently created stock of the like description would be so, just as much as merchants' brokers, who bought or sold a new description of merchandise. It was urged that the 7 Geo. 2, cap. 8, was passed for the regulation of brokers: that is not the case. It was passed for the purpose of preventing stock jobbing, and the only matter of regulation which it contains is, that brokers are to keep books, in which contracts are to be registered, under a penalty of 50*l.*; and unless the statute in question (the 6th *Anne*) gives the power of admission, with such restrictions for their good behaviour as they think reasonable, to the mayor and court of aldermen, there is no power of admission and controul over this important class of brokers in any person. Such a power is not absolutely necessary, and the legislature might have omitted to give it, but certainly it is not given by any other statute. For the reasons above mentioned; and particularly from the contemporaneous exposition of the legislature itself in the statutes of the 8 & 9 *Wm.* 3; cap. 20 and cap. 32, we are of opinion that the case of *Janssen v. Green* was rightly decided, and the judgment must be for the plaintiff.

Judgment for the plaintiff.



DOE d. TEMPLEMAN v. MARTIN and RICHARDS.

A reference in a will to extrinsic facts as part of the description of the subject devised, does not, if such facts, when proved, raise no ambiguity, authorize the entering into extrinsic evidence as to the intentions of the testator.


**EJECTMENT** for twelve acres of land called Shatterwell Close, at Shatterwell, in the parish of Wincanton, in the county of Somerset. The cause came on for trial before Mr. Justice *Gaselee* at the Taunton assizes, 1832, when a verdict was found for the plaintiff, subject to the following case:—

*Charles Thorn*, by his will, dated 3d September, 1829, duly executed to pass real estates, devised as follows:—

I give to my friend, *John Templeman*, my messuage or dwelling-house and mill, with the gardens and cottage adjoining the same, in Wincanton aforesaid, with the mill-pond, rights and privileges thereto belonging; *And also my messuage the Ark cottage, garden and lands, at Shatterwell, in Wincanton aforesaid, rented by Mrs. Sly and others*; And my messuage, dwelling-house, shop, garden and orchard at Whitehall, in Wincanton aforesaid, rented by *John Tulk* and others, with their respective appurtenances; To hold to the said *John Templeman*, his heirs and assigns for ever, charged as aftermentioned: And I also give to the said *John Templeman*, his executors, administrators and assigns, my little orchard by the side of the river, in Wincanton aforesaid, near the foregoing premises, for all my estate and interest therein, charged nevertheless as to the whole of the premises with the payment of 500*l.* within twelve months next after my decease to my executors and trustees, in aid of and towards my residuary personal estate. All other my messuages, lands, tenements and hereditaments, and also all my moneys and securities for money, goods, chattels and personal effects, as well as the 500*l.* to be so paid as aforesaid by the said *Templeman*, I give, devise and bequeath unto my friends *John Martin* and *John Richards*, To hold to them the said *J. M.* and *J. R.* and the survivors of them, and the heirs, executors, administrators and assigns of such survivors, upon trust for sale to pay debts and legacies.

The testator died the 9th of January, 1830. At the date of his will and of his death, he was entitled to certain premises lying at Shatterwell, in Wincanton. Of these there were on the *eastern* side of Shatterwell Lane, at the date of the will—

1. The principal messuage.
2. Two closes of land rented by *Mrs. Sly*, who had taken them from the testator at Christmas, 1828, at 30*l.* per annum, and who in 1829, after mowing the grass, let the after-grass to her son, *William Sly*, until Christmas, for 3*l.*

1833.  
  
 Doe  
 v.  
 MARTIN and  
 RICHARDS.

1833.



DOE

v.

MARTIN and  
RICHARDS.

3. The *Ark cottage*, occupied by *Prior* and another; the former paying the rent to the testator, and the latter being *Prior's* undertenant.

4. The *garden* rented by *William Lenton*, who became tenant of it within a year before the testator's death, at an annual rent of 10s.

5. The messuage, garden and orchard, called *Whitehall*, rented by *Tulk* and *Daw*, who were the sole tenants thereof at the time of the conveyance thereof hereinafter mentioned. And

6. The orchard called *Motion's Orchard*, described in the will as "the little orchard" by the side of the river, near the foregoing premises, which was occupied by the testator himself.

The first five parcels before mentioned were purchased by the testator of Mr. and Mrs. *Surrage*, in 1828, and were conveyed by one conveyance, and were described as "all that messuage or dwelling-house, formerly divided into two tenements, lying in Wincanton aforesaid, at a place called Shatterwell, near Grove Hill, with a bucking-house, garden and stable thereto belonging." Then followed a description of an acre and three roods of ground, called *Willis Hill*; a cottage, called *Ark cottage*; a close, called *Crooch Grove Close*; and also all that messuage, tenement, or dwelling-house, commonly called or known by the name of *Whitehall*, with the out-houses, bucking-houses, backsides, garden and orchard thereto adjoining and belonging, situate, lying and being at the town's end, towards *Brenton*, in the parish of Wincanton aforesaid, containing by estimation one acre, in the possession of, &c.; all which messuages, gardens, orchards, land and premises, are situate, lying and being in the parish of Wincanton aforesaid. The remaining portion, called *Motion's Orchard*, was purchased by the testator, in 1827, of Mrs. *Jane Pitman*. This, together with the before-mentioned five parcels, for some years before and down to 1826, belonged to a person named *Pitman*, and upon his dying intestate, *Motion's Orchard*, being


leasehold, passed to his mother, the before-mentioned Mrs. *Jane Pitman*, and the other five parcels, being freehold, to his heir at law, the above-named Mrs. *Surrage*.

The whole of the premises on the western side of the lane were purchased in 1824 by the testator, at one time, of *W. Messiter*; and for some years before and at the date of the testator's will and of his death, were occupied as follows:—First, *Shatterwell Close* was rented by *Charles Warren*, under a lease dated 1821, by which the testator demised to him a farm-house, garden and orchard, and several closes by name, and amongst others *Shatterwell Close*, at the rent of 170*l.* per annum; secondly, the orchard, called *Cold Bath Orchard*, was also rented by *Charles Warren*, but under a separate demise; thirdly, the messuage adjoining was rented by *William Linton*; and, fourthly, *Lewis's Orchard* was occupied by the testator himself. No part of the premises on the eastern side of *Shatterwell Lane* had ever been let with any part of the premises on the western side, except the small garden which *Linton*, the tenant of the messuage, rented for about three quarters of a year, as aforesaid.

The usual entrance to *Shatterwell Close*, going from *Motion's Orchard*, from which it is separated only by *Shatterwell Lane*, is not by that lane, but by another lane, called *Wright's Lane*, the lands abutting on the west side of *Shatterwell Lane*, opposite *Motion's Orchard*, being too steep to allow of any passage across the lane into *Shatterwell Close*.

In any case there will be a small deficiency of assets for the payment of debts and legacies under the will. If *Shatterwell Close* and the other premises claimed by the lessor of the plaintiff did pass by the devise to him, the estimated deficiency will be very considerable.

The question for the opinion of the Court is, first, whether the above facts are admissible in evidence on the part of the defendants; secondly, whether, under the devise in question, *Shatterwell Close* passed to the lessor of the plaintiff.

1833.  
  
 Doe  
 v.  
 MARTIN and  
 RICHARDS

1833.

DOE  
v.  
MARTIN and  
RICHARDS.

*Follett*, for the plaintiff. None of the facts mentioned in this case are admissible in evidence, except those which shew by whom the premises were occupied at the time when the will was made. There is no ambiguity on the face of the will. Mrs. *Sly*, it is to be observed, held no lands jointly with any other persons. Therefore, in order to shew that the words "lands at Shatterwell, in Wincanton aforesaid, rented by Mrs. *Sly* and others," apply to Shatterwell Close, it is sufficient to prove that such close is situate in Shatterwell, and was rented by some person of the testator, and was not in the testator's own occupation. In such a case as this the Court will not admit extrinsic evidence to shew the testator's intention. The rule appears to be this; that if there be property of the testator, which answers to the whole description in the will, the Court will not receive evidence of intention to give any other property or a smaller quantity. In the third volume of *Starkie on Evidence* (a), the cases on this subject are collected; and it is there said, that "when extrinsic evidence is allowed to operate so far as to give to the terms of the will a different construction from that which the terms abstractedly imply, the rule seems to be carried farther than is warranted by principle or analogy." The leading case on this subject is that of *Doe v. Chichester* (b), where it was said by Sir V. Gibbs that Courts of law had been jealous of the admission of extrinsic evidence for the purpose of explaining the intention of the testator, and that he knew of one case only in which it is permitted, that is, where an ambiguity is introduced by extrinsic circumstances. In that case the testator devised *his estate at Ashton*, and the Court refused to receive evidence that the whole of the property in three different manors went by the name of the Ashton estate, two only of them being in the parish of Ashton. It is attempted here to give evidence of the former conveyances, to shew that the testator obtained the estates by different titles, nothing having been previously shewn to raise any ambiguity. In the case of

(a) 1st edit. 1013.

(b) 4 Dow, P. C. 93; 3 Taunt. 147.

*Miller v. Travers* (a), the testator devised his estates in the county of Limerick and city of Limerick. The testator had no estate in the county of Limerick and only a small estate in the city of Limerick. A draft of the will was offered in evidence to shew that it was the testator's intention to pass his real estates in the county of Clare. The Court declared that the evidence offered was inadmissible. The Chief Justice in that case says there are two classes of cases in which parol evidence to explain a will has been admitted. "The first class is, where the description of the thing devised or of the devisee is clear upon the face of the will, but upon the death of the testator it is found that there are more than one estate or subject-matter of devise, or more than one person, whose description follows out and fills the words used in the will. The other class of cases is that in which the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular." If the doctrine of the Chief Justice be applied here, it will be found that in this case the evidence offered is not admissible. It cannot be said that there are two properties answering to the description in the will, one on either side of Shatterwell Lane; for the description of the whole is not more than sufficient to follow out and fill the words used in the will. Neither can it be said that the description of the property intended to be devised is true in part, but not true in every particular.

But assuming that the evidence is admissible, it confirms the supposition that the testator intended to pass the land in question to the lessor of the plaintiff.

*Erle*, contra. By the terms of the will, Shatterwell Close did not pass; and for the purpose of shewing this, it is necessary to look at those terms minutely. The description given of the property intended to be devised is a specific, and not merely a local description. The first devise is of

1833.

DOE  
v.MARTIN and  
RICHARDS.



1833.

DOE  
v.MARTIN and  
RICHARDS.

a messuage or dwelling-house, and mill, with the gardens and cottage adjoining the same, in Wincanton aforesaid, with the mill-pond, rights and privileges thereto belonging. This devise is very specific. The next devise is the devise in question, of the testator's messuage the Ark cottage, garden and lands at Shatterwell, in Wincanton aforesaid, rented by Mrs. *Sly* and others. There is here no general devise of all the testator's lands in Shatterwell, by whomsoever rented, but the testator merely points out the principal tenant Mrs. *Sly*, and appears to have thought that he would be understood to mean one particular property, of which Mrs. *Sly* was the chief occupier. Then comes the third devise, which is undoubtedly a devise of a specific property; and at the end of these three devises is that which connects them all together, viz. the words "with their respective appurtenances;" from which it appears that the testator meant to devise three specific properties. Another argument also arises upon the face of the will, that the little orchard is described as near the foregoing premises; and in fact it is contiguous to the property occupied by Mrs. *Sly*, but separated by the lane from Shatterwell Close.

The devise is made with reference to extrinsic facts, for it is only by them that it can be known what lands are occupied by Mrs. *Sly* and others; and if this be so, evidence may be given of extrinsic facts to shew whether the land claimed is parcel or no parcel of the thing devised. The principle is laid down in *Sunford v. Raikes* (a), *Doe v. Collins* (b), *Doe v. Burt* (c), *Goodtitle v. Paul* (d), *Marshall v. Hopkins* (e), and *Doe v. Bower* (f). From these cases it appears that when there is a reference made to extrinsic facts, evidence of these facts has been admitted to shew whether a particular property was parcel or no parcel of what the testator intended to devise. The class of cases relied on by the other side, are cases in

(a) 1 Merivale, 653.

(b) 2 T. R. 498.

(c) 1 T. R. 701.

(d) 2 Burr. 1089.

(e) 15 East, 309.

(f) 3 B. &amp; Adol. 453.

which the testator devised property within local limits. To admit evidence in those cases of an intention to pass more than is contained within those limits, would be to admit evidence to alter and control the will; *Doe v. Lyford* (a), *Doe v. Greening* (b), *Tuttenham v. Roberts* (c), and *Doe v. Osenden*, are cases of this description. Here the devise is not precise in its application to the facts referred to, and therefore evidence is admissible to explain it.

There is not here, as in the case where the name of the property is mentioned, any precise devise, unless all the terms are taken into consideration. Now, if the construction which has been contended for be correct, the words "by Mrs. Sly and others" are nugatory, as it would have been sufficient to say "all my lands in Shatterwell rented." From *Br. Abr. Grant*, pl. 92, page 22, it appears that where the special name of the property is not mentioned, every part of the description must be looked at. This principle is also quoted and recognized in *Wrotesley v. Adams* (d), *Doddington's case* (e), *Doe v. The Earl of Jersey* (f), and *Goodtitle v. Southeron* (g). In this case the testator has by no means given a proper name, nor has he used words from which it is clear that he meant to pass all the lands within the local limits of Shatterwell. On the contrary, he appears to refer to some facts out of the will, by which he intended it should be known how much he gave. He does not say "all my lands in Shatterwell by whomsoever rented;" and there is sufficient on one side of the lane to satisfy the terms of the will. It appears that Whitehall is in Shatterwell. Thus the testator gives to the same devisee premises at Whitehall, which, according to the construction contended for on behalf of the plaintiff, he has already given to him under the general devise of lands in Shatterwell. The collocation of the devises is tantamount

1833.

Doe  
v.MARTIN and  
RICHARDS.

(a) 4 M. &amp; S. 550.

(b) 3 M. &amp; S. 171.

(c) Cro. Jac. 21.

(d) Plowden, 189.

(e) 2 Co. Rep. 33 a.

(f) 1 B. & A. 550; 3 B. & C.  
870.

(g) 1 M. &amp; S. 299.

1833.

DOE  
v.MARTIN and  
RICHARDS.

to a declaration by the testator that the lessor of the plaintiff should not have all the lands in Shatterwell by whomsoever rented. In several of the cases cited, where extrinsic facts have been referred to, evidence has been admitted of the mode in which the testator came to the possession of the property, for the purpose of shewing his intention. If that evidence were admitted here, it would raise a strong presumption that it was the testator's intention to devise the lands on the eastern side of Shatterwell Lane only. This construction is also forcibly confirmed by a consideration of the position of the other lands, and by the circumstance that the occupier of Shatterwell Close is the principal occupier, and would probably have been mentioned in preference to Mrs. Sly, if that close had been intended to pass. It is also extremely improbable that he should have intended to devise all within a particular local description, and not that which was under one set of tenants. He cannot have intended to dismember a large farm, as would be done if the construction of the other side is adopted. The inconvenience that would arise from a construction which would have the effect of dismembering property in one occupation, was alluded to in the case of *Doe v. Collins*. The Court will attach some weight to the circumstance that the remainder of the estate, after taking Shatterwell Close, is greatly insufficient to satisfy the debts and legacies which the testator has charged upon the residue; *Doe v. The Earl and Countess of Lucan* (a). [*Littledale, J.* Are there other lands to satisfy the words of the residuary devise?] There are other lands, but the charges upon them exceed their value.

*Follett* in reply. The authority of the cases cited may be admitted. The correct rule of law upon the subject is to be found in the case of *Sanford v. Raikes*. Evidence may be given to apply the description in the will. Here the description is "all my lands in Shatterwell," and evidence is

(a) 9 East, 448.

of course admissible to shew to what lands this description is applicable, but evidence cannot be received to shew that the testator did not intend to devise any of the lands within the description. The principle to be collected from *Brooke's Abr.* (a) does not apply to the present case. In no case have the Court decided that land, to which the description in the will is applicable, shall not pass, though they have sometimes rather extended the meaning of the terms used, in order to pass that which it was the testator's apparent intention to give. In *Doe v. Collins* the Court merely put an extended construction upon a word. There it was said that a bequest of the testator's "house" passed a stable within the same fence, and occupied by the testator together with it; for the stable was in contemplation of law a part of the house. So in the other cases cited. To admit evidence in the present case, for the purposes contended for, would be to admit evidence to contradict the terms of the will, which would be making a new will for the testator. It is said that the devise of the testator's messuages, cottage, and garden, and lands, at Shatterwell, rented by Mrs. Sly and others, must mean the particular lands on the eastern side of Shatterwell Lane. If the expression had been "and lands rented *therewith* by Mrs. Sly and others," the argument might have been correct, but it is sufficient that such are not the terms of the devise, and to construe it as if that word had been introduced, would be to alter the will.

As to Whitehall being within Shatterwell, it is quite clear from the expression of the testator, "my messuage, &c. at Whitehall," that in common parlance Whitehall is not said to be a part of Shatterwell. Therefore it cannot be said that this would be a cumulative devise of the same lands twice to the same devisee.

With regard to the residuary fund, if there had been no land whatever, except Shatterwell Close, that could pass under the terms of the residuary devise, the Court might

1833.  
DOE  
v.  
MARTIN and  
RICHARDS.

(a) Tit. Grant, pl. 92, page 22.

1833.

  
 Doe  
 v.
MARTIN and  
RICHARDS.

have supposed that it was the intention of the devisor to give this particular portion of his property for that purpose, but the fact here is otherwise.

DENMAN, C. J.—This is an ejectment for lands, which the lessor of the plaintiff claims as devised to him by *Charles Thorn*. The devise in question is in these terms—"I give to my friend *John Templeman*, my messuage, the Ark cottage, garden and lands at Shatterwell, in Wincanton aforesaid, rented by *Mrs. Sty* and others." The plaintiff in the first instance makes out a clear prima facie title when he shews that the lands in question are lands in Shatterwell not in the occupation of the testator himself. But then it is said that the expression used shews that the testator could not have intended that all the lands in Shatterwell, except those in his own occupation, should pass; that he had some further limitation in his mind; and evidence was offered for this purpose. I apprehend that any evidence may be received to shew that the description in the will is ambiguous in its application to the property of the testator, but I must own I think that no ambiguity whatever is raised by the evidence in this case. As no ambiguity is raised, we are not warranted in receiving further evidence of the testator's intention. With regard to what has been said upon the circumstance that *Mrs. Sty's* name only is mentioned, it does not follow from that circumstance that the testator contemplated her as the principal tenant of the lands which he was devising. To the arguments upon this and upon the other circumstances, it is a sufficient answer to say that they are founded upon mere conjecture. Upon the whole, I think that no such ambiguity is raised upon the will as will entitle the Court to receive evidence to narrow the construction of this devise.

LITLEDAL, J.—I think it not improbable that if the testator had intended that the lands on the western side of the lane should not pass, he would have expressly said so.

1893.

DOE

v.

MARTIN and  
RICHARDS.

The first question raised upon the special case is, whether the facts stated in it are admissible in evidence on the part of the defendant. I apprehend that they are admissible to shew what was the state of the property or from whom purchased, but it does not appear to me that, when admitted, they raise sufficient ambiguity on the face of the will to let in further evidence of the intention. I think we must construe the devise in question as if the testator had expressly said *all* my lands in Shatterwell, in the occupation of Mrs. Sly and others. Now the question is, whether the lands on the western side of Shatterwell Lane fall within this description. I can see no reason for excluding them. It is argued that the collocation of the words shews, that the testator considered himself as devising lands which were rented by the occupiers of the several premises mentioned in the foregoing part of the same devise, and of which Mrs. Sly was principal tenant. There is no legal ground for such a supposition. Perhaps having mentioned the messuage first, he named Mrs. Sly as the occupier of that messuage; and the word "land" is not so situated in the sentence that we can say that the testator meant land rented therewith. Then it has been argued, that inasmuch as Whitehall is within Shatterwell, if the testator has already devised all the lands in Shatterwell, the devise of the messuage &c. at Whitehall was nugatory; but it would appear that Whitehall was the name of some hamlet or place which in the testator's mind was regarded as a distinct district from Shatterwell. An argument is made upon the situation of this devise, between two others of a specific description. In neither of those devises is any land devised, so that there is no ground for this argument. Then it is said that the testator speaks of the little orchard as "near" to the foregoing premises, and that this is not the case with Shatterwell Close, which is separated from the orchard by the lane. But "near" does not necessarily mean "contiguous." The last argument is, that unless Shatterwell Close passes to the defendants, there is not sufficient to satisfy the residuary devise, but it appears that there is other property to satisfy the terms of the devise, and I do

1833.

DOE

v.

MARTIN and  
RICHARDS.

not think that we can inquire into the sufficiency in point of amount, to meet the charges upon the residuary fund.

PARKE, J.—I am also of opinion that the lessor of the plaintiff is entitled to recover. The first question is, whether the facts are admissible in evidence. I think facts and circumstances relating to the subject of the devise are admissible: such as possession by the testator, the mode of acquiring, local situation, and the general state of the testator's property. The Court may take such things into consideration so as to put themselves in the place of the testator, and then see how the terms of the will affect the property. In construing the will we are only to inquire what passes under the words of the will. We are to discover what the will itself means, not what the testator intended. I have no doubt that Shatterwell Close passes by the description in the devise before the Court, if that clause be read by itself. Then what is there to oblige us to put a different construction on the word "lands?" *Primâ facie* all the land in Shatterwell passed, and I see nothing to rebut this presumption. If we look at the context in the will, there is nothing that I perceive sufficient to induce us to narrow the application of the terms; and if we look at the extrinsic facts, no incongruity appears. The testator may very probably have meant to give all the lands in Shatterwell to one person, notwithstanding that such a devise would have the effect of dismembering the estate. With respect to the argument arising out of the insufficiency of the residuary estate, we cannot know whether the testator supposed that his personal property was quite sufficient to pay the whole of his debts and legacies.

Postea to the plaintiff (a).

(a) The cases on this subject are collected and analysed by Mr. Wigram, in a treatise which bears the title of "An Examination of the Rules of Law respecting the

Admission of Extrinsic Evidence in aid of the Interpretation of Wills, contained in observations on the case of *Goblet v. Beechey* and others."

1833.  


## The KING v. The Inhabitants of HAUGHLEY.

UPON an appeal against an order for the removal of *Thomas Rampling*, his wife and son, from the parish of Mendlesham to the parish of Haughley, both in the county of Suffolk, the sessions confirmed the order, subject to the opinion of this Court upon the following case.

By an act of 18 Geo. 3, all persons seised of hereditaments of the annual value of 30*l.* and upwards, in the parishes within the hundred of Stow, in the county of Suffolk, were incorporated by the name of "The Guardians of the Poor within the hundred of Stow, in the county of Suffolk," and were empowered to have a common seal, and to sue and be sued by that name, and the poor in the said hundred were placed under the management of the corporation. And it was enacted, that it *should be lawful for the directors and acting guardians* thereafter mentioned, at any general annual meeting, or at any of the quarterly meetings by that act directed to be held, *with the consent of two justices of the peace, to bind any poor child or children; under their management, apprentice* for such term as they should see fit, not exceeding seven years, in like manner as churchwardens and overseers of the poor, with the assent of the justices of the peace, were then by law empowered to do. The act afterwards enacts, that the acting guardians, or so many of them as should think fit, should assemble on the 24th of June then next, and elect, by ballot, twelve of the guardians, who should be called directors of the poor within the hundred of Stow, in the county of Suffolk. The qualification of a director was, the being seised of messuages, &c. of the annual value of 50*l.*; but it was provided that such of the guardians as were seised of messuages, &c. of the annual value of 400*l.*, and the justices resident in the hundred, should be directors without ballot. A poor-house was to be built under the management of the directors, and upon its being finished, a general-meeting of the guardians was to be

A special authority delegated by a local act to the directors and guardians of paupers of a district incorporated for the government of the poor, to bind out apprentices, must be executed by an indenture, to which the seals of the apprenticing directors and guardians are affixed. The corporate seal is insufficient.



1883.

The KING  
v.  
HAUGHLEY.

held, at which the vacancies occurring among the directors who had been ballotted for were to be filled up, and the guardians were to elect 24 guardians, who, together with the directors qualified as aforesaid, and the twelve directors chosen by ballot, were to be directors and acting guardians of the said hundred, for putting in execution all the powers and authorities of that act. The directors and acting guardians were to hold four general quarterly meetings in each year, one of them to be always held on the Friday after the 24th June, and to be for filling up vacancies in the directors chosen by ballot, and for choosing acting guardians; and after filling up the vacancies, and the choosing of acting guardians, the acting guardians were at such meetings to choose six from amongst themselves present at such meetings; and the directors and the six guardians so chosen, were to audit the accounts, to choose a treasurer and clerk, and they were thereby authorized and required to transact and do all other business to be done at such quarterly meetings respectively, in pursuance of that act. By an act passed in the 5 Geo. 4, c. 18, for altering and enlarging the powers of the recited act, the provisions in 18 Geo. 3, respecting apprenticeships, were repealed, and re-enacted, with a clause enabling the *directors and acting guardians*, present at any meeting held in pursuance of the 18 Geo. 3, to bind poor children *by indenture under the common seal of the corporation*, a quarterly meeting of the directors and acting guardians being duly held under the directions of the act 18 Geo. 3. By an indenture bearing date the 1st day of October, 2 Geo. 4, the directors and acting guardians (with the consent of justices, as required by the 56 Geo. 3,) bound out the pauper, who was a poor boy under their management, apprentice to a Mr. Steggall, of Gipping, for the term of one year. To this indenture the common seal of the corporation was affixed at such meeting; but the indenture was not otherwise executed by the directors and acting guardians. The indenture was executed by the master. The pauper served the year, sleeping in the parish of Gipping. The acts re-

cited in the case, and a copy of the indenture annexed, are to be considered as forming part of the case.

If the Court shall be of opinion that this was a valid binding under the 18 Geo. 3, the order of sessions is to be quashed, otherwise to be confirmed.

The operative part of the indenture was in this form :  
 “ Witnesseth that the *directors and acting guardians* of the poor within the hundred of Stow, in the county of Suffolk, incorporated for the better relief and maintenance of the poor within the said hundred, by and with the consent of the two justices, &c, do put and place *Thomas Rampling* as an apprentice.”

*F. Kelly* and *Austen* in support of the order of sessions. This indenture is invalid. It is attempted to be set up as the deed of the corporation ; but the deed itself only professes to be made by a part of the corporation. The affixing of the common seal is a sufficient execution of an instrument by the corporation ; but it is necessary that the execution should be by the whole corporation as a corporate act. This is not a corporate act. The duty of binding is delegated to a small body only, who act as churchwardens and overseers, and cannot execute an indenture of apprenticeship otherwise than by signing it individually. The parties to this deed had no authority to use the common seal. This argument is fortified by the act of 5 Geo. 4, passed subsequently to the date of this indenture, for altering and enlarging the powers of the former act, by which it is expressly provided, that the *directors and acting guardians* shall have power to bind poor children under the common seal of the corporation. It appears to have been in the contemplation of the legislature, that in order to give authority to the *directors and acting guardians* to use the common seal, a new enactment was requisite. In *Cruise's Digest* (a), Lord Holt is re-

1833.

The King  
 v.  
 HAUGHLEY.

(a) 4th vol. cap. 2, s. 76.

1833.  
  
 The KING  
 v.  
 HAUGHLEY.

ported to have said, that if a person pretending to be mayor of a corporation, put the corporation seal to a deed, yet it is not by that the deed of the corporation. The corporation seal having in this case been affixed by strangers, does not authenticate the deed as the deed of the corporation.

*Palmer, contra.* The corporation must be taken to consist of the occupiers of land within the hundred, and the directors and acting guardians must be considered the governing body. The acts of the governing body are the acts of the corporation. The seal must be in their custody. They are to purchase lands, and to make contracts, not in their individual but in their corporate capacity. It is incident to a corporation to have a common seal; but it may be that only a certain part of that corporation have the power of affixing the seal. The act done by the directors and acting guardians, is a corporate act. Where it is said in the act, that the directors and acting guardians may bind out in like manner as churchwardens and overseers of the poor, it is only intended to refer to the required assent of two justices, and not at all to the mode of executing the indenture of apprenticeship. The passage from *Cruise's Digest* has no application, because the seal has not been, in this instance, affixed by a stranger to the corporation. The directors and acting guardians are to meet quarterly, are to fill up vacancies amongst themselves at one of these meetings; and the whole business of the corporation is in fact entrusted to them to be done. But the deed is well executed, considered as the deed of the directors and acting guardians individually, for this not being an instrument conveying land, sealing alone, without signing, is sufficient. One seal may be used by several persons, and it is sufficient if a party adopts a seal; therefore if the seal was affixed to this deed by order of the directors and acting guardians, it is their seal, and may be

considered to have been affixed by them individually (a). [Parke, J. Although one seal may suffice, there has been no delivery as the deed of the individuals. This reduces it to the question, whether it can be treated as the deed of the corporation.] They may be considered as the agents of the corporation, executing the deed on their behalf. [Parke, J. In the deed they are described as the directors and acting guardians.] They may mean to describe the corporation at large, though by a wrong name. [Parke, J. It is quite clear that they did not intend to act as individuals, for they describe themselves as a corporation. Then the question is, whether the deed in such a corporate name is invalid or not.] A corporation may have another name by custom.

1833.  
  
 The KING  
 v.  
 HAUGULEY.

DENMAN, C. J.—There is a difference between an ancient corporation and a new one. An ancient corporation may have a name by prescription, different from that by which it was incorporated; but that cannot be the case with one of modern date.

LITLEDALE, J.—In this case the real name of the corporation is “Guardians of the Poor within the hundred of Stow, in the county of Suffolk;” and in the deed, the words “directors and acting,” have been introduced. The deed is, I think, therefore invalid.

PARKE, J.—I am of opinion that this deed is not valid. The rule is laid down in the case of *The Mayor and Burgesses of Lynne* (b), that the name of a corporation in grants or conveyances must be the same in substance with the proper name of the corporation, although it need not be the same in syllables and words. And the same doctrine is recognised in the case of *The Croydon Hospital v. Farley* (c). Then the question comes to

(a) 4 Cruise's Digest, cap. 2,  
 s. 75; Shep. Touch. 57.

(b) 10 Coke Rep. 124.

(c) 6 Taunt. 467.

1833.

The King  
v.  
HAWKLEY.

this; is the name used in the deed in substance the name of this corporation? The name used is "the directors and acting guardians of the poor," and this certainly is not substantially the right name. Therefore I think that the deed is invalid.

Order of Sessions confirmed.

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EVERETT v. YOEUELLS.

Upon a difference of opinion, no misdirection to tell the jury that they ought to yield to conviction and to conversion by their fellows. Affidavit of jurymen not admissible to shew what was said by a judge at the trial of a cause where the judge's notes are before the Court.

Affidavit of a jurymen as to what passed in Court not admissible where the notes of counsel are produced, except at most to supply deficiencies occasioned by their absence. Per *Parke, J.*

**ASSUMPSIT** on the warranty of the soundness of certain lambs bought by the plaintiff of the defendant. The trial before *Vaughan, B.* and a special jury, at the Thetford assizes, 1832, commenced on Friday, and on Saturday evening the jury retired to consider their verdict; they remained in consultation until about eleven o'clock on Sunday morning. It appeared from the affidavits of two jurors and another individual, that at that time the learned baron told the jury that he thought "concession ought to be made by the minority to the majority;" that in consequence of this recommendation three of the jury gave up their opinion, and shortly afterwards a verdict was found for the defendant. In Easter term, 1832, *Storkes, Serjt.* obtained a rule nisi for a new trial, upon two grounds: first, that the verdict was against the weight of evidence; secondly, that there was a misdirection on the part of the learned judge in recommending the minority of jurors to concede their opinions to the majority. From the report of the learned baron, it appeared that upon the occasion of his addressing the jury, he told them it was their duty to lay aside all prepossessions, that each might distrust his own judgment, and that they should yield to conviction and to conversion by their fellows; but it did not appear from this report, that the particular expressions sworn to had been used by the learned baron.

*F. Kelly* now shewed cause. This application was

founded upon the affidavits of two jurymen and another individual, whose knowledge is evidently founded only upon hearsay. The Court refused to receive the affidavits of the two jurymen, and granted the rule upon the third affidavit only. The learned judge explained to the jury what, according to the first principles of human reason, was their duty in such a case.

Here he was stopped by the Court.

*F. Pollock, Storkes, Serjt., and B. Andrews.* The rule is drawn up upon the three affidavits. Whether the direction be correct or not, the affidavits of the jurymen are admissible. [*Parke, J.* The affidavit of a jurymen cannot be received.] It is not available to prove any thing which happened among the jury themselves, but it is submitted that a jurymen is as competent as any other individual to prove a fact which occurred before the trial, or which took place in open Court. [*Parke, J.* At most these affidavits can only supply that which, owing to the absence of counsel, does not appear upon their notes. But when we have the notes of the learned judge, we must attend to them exclusively.] Although the expressions sworn to do not appear upon the learned judge's notes, there is yet nothing inconsistent with or negating the fact of his having used them, and if they were used, it is apprehended that there would be such a misdirection as would be ground for granting a new trial. [*Denman, C. J.* You cannot expect that a learned judge should deny the truth of the matter alleged in the affidavit. He has not seen it.]

Looking merely to the notes of the learned judge, the tendency or the expression used would be to disturb the separate consideration of the question by each jurymen, and to induce a single man, who differed from the rest, to sacrifice his opinion for the sake of unanimity. The question is here, as in all cases of applications for new trials, whether the cause has been fully and impartially laid before and considered by twelve men, and decided by them ac-

1833.  
  
 EVERETT  
 v.  
 YOEUELLS.

1833.

EVERETT  
v.  
YOUVELLS.

cording to their consciences. After fifteen hours consideration, the jury, unable to come to any determination, are addressed by the learned judge, who informs them that it is their duty to submit to conviction and to conversion by their fellows. It is scarcely possible, under the circumstances, to suppose that the minority did not, in consequence of this address, yield their opinions. But even supposing that they were induced to do so merely from a fear of further confinement, it cannot even then be said that the case has been fully, fairly, and impartially decided.

DENMAN, C. J.—It is quite impossible that any verdict could ever stand where there has previously been a difference of opinion, unless the present one is to be sustained. The learned judge could not have done better than tell the jury that it was their duty to put aside all prepossessions and yield to conviction and to conversion. This is a most proper direction. It was a fair thing to call the attention of the jury to the circumstance that a majority had formed an opinion. It is, perhaps, unfortunate that such language was not held upon the first trial (a).

LITTLEDALE, J.—There ought not to be any new trial. When the jury retire to consider of their verdict it must be taken for granted that some difference of opinion exists between them, some being for the plaintiff and some for the defendant; and it is not likely that they will become unanimous without hearing the arguments of each other, and submitting to be convinced. Here, after many hours deliberation, the jury find that there still exists a difference of opinion. In this emergency they come to the judge, who can only do one of these things; either discharge them, say nothing to them about their duty and send them back, or first explain to them the nature of their duty in general, and then direct them again to retire. If the judge has done any of these three things, there

(a) The cause had been taken but the jury being unable to agree, down for trial at a former assize, they were discharged.

is no misdirection on his part. The jury certainly returned very soon; but the motive by which they were induced to come to a determination, can only be conjectured. We may certainly conjecture that they understood that the learned judge had told them that the minority ought to yield to the majority, but we cannot know this. Four or five hours would have looked more like conviction, but there can be no particular time limited or required for that purpose.

PARKE, J.—I am altogether of the same opinion.

Rule discharged.

DOE, on the several Demises of JAMES DEARDEN, Esq.  
the Hon. AUGUSTA ADA BYRON, Sir JOHN CAM HOBHOUSE, and others, v. JAMES MADEN, Esq.

THIS was an action of ejectment, brought by the lord of the manor of Rochdale, in the county of Lancaster, to recover possession of a parcel of land which had been inclosed about sixteen years from an open common called Tooter Hill and Reapes Moss, in the parish of Rochdale, which he claimed as part of the waste of his manor. The cause came on for trial before Mr. Baron Gurney, at the Lancaster spring assizes, 1833, when it appeared that Tooter Hill and Reapes Moss were part of a tract of land called Brandwood, and the question to be determined was, whether Brandwood was part of the manor of Rochdale. The plaintiff made out his title in the following manner:—*Mr. Dearden*, at the present time, is lord of the manor of Rochdale. In the 27th year of her reign, *Queen Elizabeth* granted the manor of Rochdale to *Sir John Byron* for a term of years. By this grant it appeared that *Queen Elizabeth* was seised of the manor in right of the Duchy of Lancaster. In 1625, *Charles the First* granted thereof." Held, that the grantees were to be presumed to have been in the time of the second grant, and that it operated as a release of the fee, Grant (before A.D. 1209) "of that pasture which is called Brandwood to feed their animals," and that the grantees should "have in that pasture 100 cows." By deed of 25 *Edw. 3*, the owner of the fee granted all his right, and that it should be lawful for the grantees "to inclose the said pasture, and to reduce it to cultivation, or to make any other profit possession at

1833.  
EVERETT  
v.  
YOUVELLS.



1833.  
 ~~~~~  
 Doe
 v.
 MADDEN.

the manor of Rochdale to *Edward* and *Robert Ramsey* in fee, *Edward Ramsey* survived *Robert*, and conveyed the manor to Sir *Robert Heath* in fee; Sir *Robert Heath*, in 13 Car. 1, conveyed it to Sir *John Byron* in fee. The manor remained in the *Byron* family until 1828, when it was conveyed by Sir *J. Cam Hobhouse* and others, the trustees under the will of the late Lord *Byron*, to *James Dearden*, since deceased, and *James Dearden*, one of the lessors of the plaintiff, is his heir at law. Grants by the former owners of the manor from time to time, of parcels of Brandwood, to hold by copy of court roll, to various persons, and amongst others to some of the family of the *Holles*, were produced, and various acts of ownership in Brandwood were shewn to have been exercised by the moorlookers of the lords of the manor of Rochdale. The lessor of the plaintiff further proved that Brandwood was within the parish of Rochdale, and that the manor and parish of Rochdale were reputed to be co-extensive.

In answer to this case, the defendant proved the following facts and documents:—*Roger de Lacy* was seised of the manor of Rochdale and of Brandwood, and made a grant to the abbot and monks of Stanlawe. The original of this grant could not be found, it was therefore proved by a copy found in an ancient chartulary of the abbey of Whalley (*a*), in the possession of Earl *Howe*, the owner of the scite of the abbey. The following is a copy of the translation read at the trial:

“ Know all men, as well present as future, that I *Roger de Lacy*, constable of Chester, have given and grauted, and by this my present charter have confirmed to God and the Blessed Mary, and to my abbot and monks of the blessed place of Stanlawe, four oxgangs of land in Rochdale, in the township which is called Castleton, with all their appurtenances, with common of the whole township of Rochdale, free and discharged from all service, exaction and custom, belonging to me or my heirs for ever.

(a) The abbot and monks of Stanlawe were removed, about the year 1283, to Whalley, in Lancashire.

Also I have given to them, in my forest, *that pasture which is called Brandwood, to feed their animals*, by the divisions under mentioned, to wit, from Gorsichelache to Cuhopheved, and so as the Cuhope descends to the Irewill, and so Irewill to Fulbachope, then going up to Saltergate, then to Hamstalesclough, and so to Denesgreve, and so by the top of the Moss to Cubehep to Gorsichelache. *Also the aforesaid monks shall have in that pasture 100 cows, with the offspring of two years. And if I shall have cattle there, their cattle shall feed and go far and wide, wheresoever mine feed and go.* And I forbid any of my bailiffs or servants to offer to my said monks or their men, any trouble or grievance, or by injuring their animals to unjustly distress them. And I and my heirs will faithfully warrant this my gift to my aforesaid monks against all men. To these being witnesses, Lord Turgesius, Abbot of Kyrkestall(a); Richard de Chester, Eustace of Chester, my brothers; Robert Wallenses, William de Longvillers, Hugh de Spencer, Thomas de Spencer, Hugh de Dutton, Adam de Dutton, Geoffrey their brother, Hendon de Longvillers, Henry Wallens, Geoffrey Pincerna, Master Walter the physician, Robert the clerk, Henry Goodman, and many others."

By the record of a suit before the justices of Eyre, in Lancaster, in 17 *Edw. 3*, between the then Abbot of Whalley, plaintiff, and the forester of the forest of Penhul, respecting a claim of puture (b), made by the forester, it appears that the jury, amongst other things, found that in the reign

(a) There is no date to this charter, but it appears from the circumstance of Turgesius being a witness to it, that it was made before the year 1209, for Turgesius was succeeded by Helias, as abbot of Kirkstall, and Helias was abbot in the year 1209.

(b) Puture is a right of taking a portion of victuals and provender from the tenants of a certain district, 4 *Inst.* 307. In the re-

cord of this suit the Abbot of Whalley complained that the forester had charged the manor of Brandwood by claiming there "certain puture for himself and his four foresters, and for his horse and one boy, to wit, for each Thursday night and for each Friday during the whole year, to wit, victuals, as well meat as drink, at the costs of the said abbot's aforesaid manor."

1888.

 Don
 v.
 MADEN.

1833.

DOE
v.
MADEN.

of King *John*, *Roger de Lacy*, by the deed which has been above set out, gave Brandwood to the Abbot of Stanlawe, under which the abbot was seised, and that in the time of *Hen. 3*, the then abbot first built houses in Brandwood, and brought into cultivation a great part thereof.

The estate of *Roger de Lacy* devolved to *Henry*, Earl, and afterwards Duke, of Lancaster, who, in the 25 *Edw. 3*, having had a dispute with the abbot and monks as to the extent of their rights in Brandwood, made a release to the Abbot of Whalley by a deed, of which the following is a copy of the translation read at the trial, and which was proved in the same way as the grant of *Roger de Lacy*.

"To all to whom this present writing indented shall come, Henry, Earl of Lancaster, Derby, Leicester, and Lincoln, Steward of England, greeting. Know ye that whereas the Lord Roger de Lacy, Constable of Chester, of good memory, and our predecessor of the Lordship of Blakburnshire and of Rochedale, formerly had given and granted by his deed, which we have seen, among other things, to God and the Blessed Mary, and to the abbot and monks of the Benedictine place of Stanlawe, the predecessors of the abbot and convent of Whalley, that pasture which is called Brandewoode, in his forest, by the divisions under mentioned, that is to say, [here the boundary line was described as in the former charter,] freed and discharged from all secular service, custom and exaction. We, Henry, the aforesaid Earl, of our certain knowledge and of our special favour, approve, ratify, and as much as in us lies confirm the aforesaid gift and grant. We willing, moreover, on account of the devotion which we have to the mother of God, the glorious Virgin, and the special affection which we bear to the person of our brother, John de Lindelaye, abbot of the said house of Whalley, to do to the said abbot and convent, and their successors, the greater favour in this behalf, have remised, *released*, and altogether have quit claimed for us and our heirs to the said abbot and convent of Whalley, and their successors for ever, *all the right and claims* which can belong to us or our heirs, by

any title whatsoever, *within the pasture* aforesaid, so that henceforth the said abbot and convent may have and hold the said pasture in severalty, exonerated, freed and discharged, as well from puture of the foresters of us and our heirs as from agistments, or any putting of cattle on the pasture aforesaid by us or our heirs, or the servants of us or our heirs, and from all other services, exactions and demands whatsoever. And that *it may be lawful for the said abbot and convent; and their successors, to inclose the said pasture, and to reduce it to cultivation, or to make any other profit thereof, at their free will, without contradiction or impediment of us or our heirs, saving to us and our heirs in the aforesaid pasture our right to hunt*, without injuring or troubling the said abbot and convent, or their successors and servants. [Then followed a release for forty acres of waste in Blackburn, and seven acres of waste in Castletou.] And we the said Henry, the aforesaid earl, and our heirs, will warrant, acquit, and for ever defend all the aforesaid pasture and waste, approved as aforesaid to the said abbot and convent, and their successors, in form aforesaid, against all people. In witness whereof we the said Earl Henry have put our seal to the part of this indented writing, remaining in the power of the aforesaid abbot and convent. And the said abbot and convent to the part of the same writing indented, remaining with us, have put their common seal. To these being witnesses, Master Henry de Walton, archdeacon of Richmond; Hugh de Berewick, our steward; Henry de Trafford, Adam de Hoghton, Nicholas le Botiller, William de Clifton, knights; Richard de Rhad, William Laurentz, John de Alnetham, and others. Given at our manor house of the Savoy, near London, the 20th day of February, in the twenty-fifth year of the reign of King Edward the Third, from the conquest of England, but in his reign of France the twelfth."

In the 28th year of *H. 8*, John Paslow, Abbot of Whalley, was attainted of high treason, and Brandwood was seised into the hands of the crown. In the 33 *H. 8*, the king, in consideration of 641*l.*, granted Brandwood, with other

1833.


 Doe
 v.
 Maden.

1833.
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 DOE  
 v.  
 MADEN.

property, to Sir *Thos. Holte*, reserving a rent of *3l. 11s. 4d.* The property remained in the family of *Holte* until the reign of *Charles* the Second, when it was sold in various parcels; and it appeared that from that period *Tooter's Hill* and *Reapes Moss* had been exclusively enjoyed in pasture by the owners of four ancient tenements, who, in the year 1812, agreed to divide it, and subsequently inclosed the whole of it. Of one portion of this inclosure the defendant is the possessor.

The learned judge, with reference to the charters, told the jury that they would operate as a severance of *Brandwood* from the manor of *Rochdale*, as the fee in *Brandwood* passed by them to the abbot and monks of *Stanlawe*, and that if *Brandwood* was once severed from the manor, it could never again become united; that as the manor of *Rochdale* was held by the king in right of the *Duchy of Lancaster*, at the time of the attainder of the *Abbot of Whalley*, and as the possessions of the abbot were seised by the king in right of the crown, *Brandwood* could not unite with the possessions of the duchy, although both were in the hands of the crown at the same time, since, by a statute passed in the first year of *Henry 4*, it was declared that the possessions of the duchy should be and remain severed from the crown (*a*). The jury found a verdict for the defendant.

*F. Pollock* now moved for a rule nisi for a new trial, on two grounds. First, that the verdict was against the weight of evidence; and secondly, on the ground of misdirection by the learned judge. There was misdirection in respect of the legal effect of the two charters or deeds which were given in evidence. The one was made 633 years ago by *Roger de Lacy*, and the other by *Henry Earl of Lancaster*, in the 25 *Edw. 3*. This latter charter could have no greater operation than a deed made by any other individual, as *Lancaster* was not

(a) Stated in 4 Inst., 205, to be catùs Lancastriæ à coronâ auctoritate Parlamenti, anno regni sui primo.  
 Ro. Par. 1 Hen. 4, intituled "Cartæ Regis Hen. 4, de separatione Du-

erected into a county palatine until the 50 *Edw.* 3. By that deed nothing more passed to the Abbot of Whalley than a right of pasture. The grant of *Roger de Lacy* conveyed only a right of pasture, and the deed of *Henry Earl of Lancaster* was only a confirmation or release of the right of pasture granted by the charter of *Roger de Lacy*. This will appear upon an examination of the charters. The charter of *Henry Earl of Lancaster* gave a licence to inclose the land, and prevented the vexatious interference of the earl's forresters, but by it the soil did not pass.

When the Abbot of Whalley was executed, the possessions of the abbey devolved to the crown, and therefore if Brandwood had been severed from the manor of Rochdale it would be re-annexed, as the manor of Rochdale was then vested in the crown. The crown took the lands of the abbey *jure ducatus*, and not *jure coronæ*.

In the course of this term the Chief Justice delivered the judgment of the Court as follows :

In this case a motion for a rule nisi for a new trial was made by Mr. *Pollock*, on two grounds.

1st. That the verdict was against the weight of evidence.

2d. That the learned judge misdirected the jury with respect to the legal effect of two instruments, one a deed of *Roger de Lacy* to the abbot and monks of Stanlawe, the other of the *Earl of Lancaster* to the abbot and convent of Whalley.

With respect to the first objection, we have had an opportunity of conferring with my brother *Gurney*, who thinks the verdict was not against the weight of evidence, and is satisfied with it.

As to the second objection, it was urged that neither of the deeds could operate to convey the soil of the pasture of Brandwood, and that the learned judge was wrong in directing the jury that they could. (The learned Chief Justice, after reading the two grants, thus continued):—The first of these is in ambiguous terms: if it had been confined to a grant of "that pasture which is called" Brandwood, it

1833.

Dox

a

MADEN.

1833.  
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 Doe
 v.
 Maden.

would have conveyed the soil, but the context seems to confine the grant to that of a right of common only.

The second instrument is in less ambiguous terms. We think it was clearly the intention of the grantor to pass a separate interest in the soil, and not a mere right of common; but there are no words to make the deed to operate as a feoffment, with livery of seisin (a).

There is, however, no difficulty in presuming that the abbot and convent were in possession at the time of the deed, which would make it operate as a conveyance by way of release (b); and we think this ought to be done in favour of the possession in modern times, the land having been actually inclosed for 16 years, and proved, by uncontradicted evidence, to have been exclusively pastured upon by the owners of three estates, as far back as living memory went.

We think, therefore, that there should be no rule.

Rule refused.

(a) After 20 years quiet possession, livery of seisin will be presumed, *Rees v. Lloyd*, Wightw. 123; *Lyford v. Caward*, 1 Vern. 196; Vin. Abr. title Feoffment, p. 205; Bull. Nisi Prius, 256 a.; *Doe v. The Marquis of Cleveland*, 4 M. & R. 666.

(b) In case 39, Leonard Rep. part 3, p. 16, it is said, "If he in the reversion upon a lease for years grants his reversion to his lessee for years by words of *dedi*

concessi and *feoffavi*, and a letter of attorney is made to make livery of seisin, the donee cannot take by the livery, for that the lessee hath the reversion presently." From this, it would appear, that if it be assumed that the abbot and convent were in possession at the time of the making of the second charter, the deed could not have operated as a feoffment, although livery of seisin had actually been given.

BODDINGTON and another v. SCHLENCKER.

The holder of a cheque is bound to present it for payment on the day following that on which he receives it. But if he pay it to his bankers before the time at which the bankers, by presenting it at the clearing house, might obtain payment on the same day, the drawer is not discharged by their omitting so to present it, although, according to the custom of London, it may be imperative upon the bankers, as between them and their customers, so to present it.

ASSUMPSIT on a cheque for 830*l.* 13*s.*, and for goods sold and delivered. At the trial in London, at the sittings after Trinity term, 1832, before Lord Tenterden, C. J., it

1833.

BODDINGTON
v.
SCHLENCKER.

appeared that the plaintiffs had sold to the defendant 24 hogsheads of sugar, to be paid for on Monday the 28th of March, 1831. Upon Saturday the 26th March the defendant called upon the plaintiffs and gave them a cheque upon his bankers, Messrs. *Bond* and *Pattisall*, across the face of which he had written the names of Messrs. *Martin, Stone* and Co., who were the bankers of the plaintiffs. This, according to the custom of bankers, rendered it necessary for the plaintiffs to pay the cheque into the bank of *Martin, Stone*, and Co., in order that they might present it for payment, since to them alone, according to the custom, a cheque so crossed would be paid. The plaintiffs sent it to *Martin* and Co. about seven minutes before four o'clock. It is an established practice amongst the London bankers to meet by their clerks each day at a place called the Clearing House, for the purpose of exchanging cheques and paying and receiving any balances due from or to each other. If a cheque is not at the clearing house before four o'clock, it is not paid, but it is usual for the bankers to send cheques after five o'clock to the bankers on whom they are drawn, and have them marked by them. The bankers, by marking the cheque, undertake to pay the amount. A cheque, before it is taken to the clearing house, has to be entered in two books at the least, generally in three, and it requires a short time for the clearing clerk to enter the cheque at the clearing house. Mr. *Stone*, who was a partner in the house of *Martin* and Co., stated, that upon the day when this cheque was paid in, from about seven or eight minutes before four o'clock, and after four o'clock, no less than 91 drafts were paid into the banking house of *Martin* and Co., and in consequence this draft and 90 others were not cleared on that day: that had a single cheque only been paid in at seven minutes to four o'clock, there would have been time to send it to the clearing house by four o'clock, and to have got it paid. On the Monday following *Bond* and *Pattisall* stopped payment, and subsequently became bankrupts, and the cheque was therefore not paid by them. On the Saturday, and at the time they

1883.

BODDINGTON
v.
SCHLENCKER.

stopped payment, they had more money in their hands belonging to the defendant than the amount of the cheque. Lord *Tenterden*, C. J. told the jury that the question for them to determine was, whether Messrs. *Martin* and *Stone* had time to make the necessary entries and send the cheque to the clearing house: that if they had not sufficient time to do that, the defendant was liable; that it was immaterial to the question in the cause that the cheque was sent to *Bond* and *Pattisall* after five o'clock and marked, and that, if they believed Mr. *Stone*, the plaintiffs were entitled to their verdict. The jury found a verdict for the defendant.

In Michaelmas term last Sir *James Scarlett* obtained a rule nisi for a new trial, on the ground that the case had not been properly presented to the jury; against which,

Campbell, S. G., and *Comyn*, now showed cause. Justice has been done by the verdict. The loss falls upon *Martin* and Co., through whose negligence it was that the cheque was not paid. The defendant is discharged, and *Martin* and Co must give credit to the plaintiffs; for they have made the cheque their own, and must take their dividend under the bankruptcy of *Bond* and *Pattisall*. These matters depend upon the custom. In ordinary cases the holder of a cheque is bound to present it on the following day, and if he neglects to do so, and the bankers fail, having money of the drawer's in his hands, the loss falls on the holder. This is so simply because such is the custom. In this case the custom proved was, that if a crossed cheque is paid by a debtor to a creditor in the city of London, and the creditor pays it to his banker on the same day, so that it may be sent to the clearing house before four o'clock, it must be presented there, otherwise in case of a failure by the debtor's banker before the close of the following day, the debtor is discharged. It is true that the holder might have retained the cheque until the following day, but if a bill be drawn payable at two months, though the holder is not bound to present it until the expiration of such time, yet if he elects to present it earlier and it is dishonoured,

and he gives no notice, the drawer is discharged. The question whether the bankers presented in due time, is a mixed question of law and fact. In *Appleton v. Sweetapple* (a), a bill payable in London on demand was given to the plaintiff in London at one o'clock in the afternoon, who did not present it till the next morning; the question was, whether he had presented it in time. Lord Mansfield left the point to the jury, who found for the defendant; but the Court granted a new trial, considering the question to be a matter of law, which the judge should have decided. The jury found again for the defendant, but against the judge's direction. A second new trial was granted, and the jury again found for the defendant; and then the Court refused to interfere. But in *Hankey v. Trotman* (b), the Court held that it was a question of fact whether the plaintiff had sufficient time for receiving the money, of which the jury were the proper judges. There the case was, that the plaintiff, a banker, had a bill on the defendant to take up, which the defendant paid him by a bill upon another banker at twelve at noon, and the plaintiff got it marked for acceptance that night; before the next morning the banker on whom the second bill was drawn stopped, and the question was, whether the plaintiff or the defendant should bear the loss, and the jury found a verdict for the defendant. This shows that the custom existed at that time, and also establishes its legality. It is precisely in point, and has not been overruled. This is not inconsistent with the existence of a general rule, that a party has until the following day to present a cheque, because this is a local custom which is not affected by the general rule. In an insurance case from Hull, the question was, whether the policy should be construed according to the custom at *Lloyd's*, or the custom of Ireland. It appears from that case, a local custom as to policies may be good. [*Littledale, J.* How far does this custom extend?] It extends to all persons who attend the clearing house. *Robson v. Bennett* (c) will

1833.

BODDINGTON
v.
SCHLENCKER.

(a) Bayley on Bills, 4 ed. p. 192. Bills, 4 ed. p. 193.

(b) 1 W. Bla. 1; Bayley on (c) 2 Taunt. 388.

1833.

BODDINGTON
v.
SCHLENCKER.

be relied on by the other side. In that case the defendants, on the 11th September, between one and two o'clock, gave to the plaintiffs a cheque upon *Bloxam* and Co. their bankers, in payment for goods. The plaintiffs lodged the cheque with Messrs. *Harrison*, their bankers, a few minutes after four, and they presented it between five and six to *Bloxam* and Co., who marked it as good; the custom was proved as here. On the 12th at noon, *Harrison's* clerk took this cheque to the clearing house, but no person attended for *Bloxam* and Co., who had stopped payment at nine on that morning, and the cheque was therefore treated as dishonoured. The plaintiffs on going with the check to *Harrison's*, passed *Bloxam's* house. The Court held that there had been no laches in the plaintiffs in not presenting the cheque to *Bloxam* and Co. on the 11th for payment, or in his bankers for not presenting it at the banking house, but merely at the clearing house, and gave judgment for the plaintiffs. There the holder had done every thing that was required of him, and the banker was guilty of no laches, for the cheque had been paid in after four o'clock. [*Littledale, J.* Do you extend your custom to all cheques, or merely to those that are crossed? It does not appear that in *Robson v. Bennett* the cheque was crossed.] To those only that are crossed. If in *Robson v. Bennett* it had been proved that in point of fact the custom was to present cheques that are paid in after four o'clock, or if the cheque in that case had been paid in before four o'clock, it is probable that the decision would have been different, and therefore the case is even an authority in favour of the defendant. Lord *Tenterden*, at the trial, thought the custom so well established, that he told the jury that their verdict would depend upon the credit which they gave to the evidence of *Stone*, as to the sufficiency of the time. [*Parke, J.* There is no doubt that, as between the banker and his customer, the banker is bound to present a crossed cheque on the same day. If the defendant, Mr. *Schlencker*, had been sued upon the cheque by Messrs. *Martin* and Co., the

question might have arisen : but it is a very different question as between debtor and creditor. The distinction should have been pointed out between such custom as between a banker and his customer, and as between debtor and creditor.] This is a bill of exchange payable to bearer on demand, and if the bankers receive it, they make it their own. [*Parke, J.* Suppose it had been a bill of exchange to be presented at any time during the day, and the holder had given to his agent particular directions to present it at ten o'clock, and he had neglected to present it till five, and the bill had been dishonoured in consequence, would this have discharged the debtor? Certainly not. Then does this custom amount to any thing more than a direction to the banker, from his customer, to present the bill before a particular time? The two cases appear precisely similar.] The banker is not a mere porter or clerk, who is ignorant of the contents of the bill, and is bound to bring back the identical notes which he receives in payment of the bill. *Martin & Co.* had a lien upon the paper, and upon the proceeds, for any debt due from the plaintiffs, and are to give credit to the plaintiffs for the amount of the cheque. If the plaintiffs had over-drawn their account, *Martin & Co.* might have retained the cheque for their own benefit. They are the holders of the negotiable instrument, and are liable for any neglect committed by them. [*Littledale, J.* The defendant is in no worse situation than if the plaintiff had sent the bill on the following day, as he might have done.] It is at the option of the holder of a cheque, whether he will present it on the first day or not. Here the plaintiffs, by sending the cheque to their bankers, declared their option to be to present it on the first day. If the holder of a bill of exchange presents it before it becomes due, and it is dishonoured, and he gives no notice, the drawer is discharged. [*Parke, J.* The question is, whether the custom does exist or not. It seems unreasonable. You say that as holders of the instrument, they may be liable for neglect in not presenting it in seven minutes after they receive it.

1833.

BODDINGTON

v.

SCRELENCKER.

1833.

BODDINGTON
v.
SCHLENCKER.

You must clearly make out an exemption in the case of bankers, from the general rule that a party has till the next day to present a cheque.] The question of negligence by *Martin* was a pure question of fact for the jury to decide upon. The jury were well aware of all the circumstances. It is to be hoped that if the custom exists, as the jury clearly thought it did, it will become an established rule, that where a cheque by the custom ought to be paid on the same day, if presented in time, the loss happening through negligence shall be borne by the negligent party. It is apprehended that the rule is not really unreasonable. The clearing house is well known, the banker knows the custom as to the cheques, and it is well known that cheques are frequently paid in before a particular time, for the express purpose of getting them paid on the same day.

Sir *J. Scarlett*, *contra*, was stopped by the Court.

DENMAN, C. J.—We do not see any possible prejudice arising to the defendant by saying that the custom, as between debtor and creditor, ought to be much better established than it has been.

LITLEDALE, J.—The custom may be very well established as between the bankers. It may be a convenient arrangement as between them, and they may bind one another by it; not, however, so much on the ground of custom as of laches. That, however, is not at present for our consideration. I cannot help observing in this case, that the banker ought to have sufficient time to enter the cheque in his books, and send it to the clearing house, and that seven minutes is much too short a time for that purpose. I cannot see why the plaintiffs should not have until the next day to send it in. The holder of a cheque is bound to send it in within a reasonable time, and the law has said, that until the close of the banking house, on the next day, is a reasonable time. This being the general

rule, I cannot see why this custom should be binding upon the holder of any cheque.

1833.

BODDINGTON

v.

SCHLENCKER.

PARKE, J.—I am entirely of the same opinion. It is very clear that there should be a new trial, on the ground that the case has not been presented to the jury in the proper way. There is no doubt that in every case of a cheque being given by a debtor to a creditor, he has till the next day to present it. But it is said that there is a custom qualifying the general rule. If there be such a custom as is contended for, the evidence of it, as between debtor and creditor, should have been clearly presented to the jury. If it had been so presented, I think that the jury, finding such a custom upon the evidence, would have come to a wrong conclusion. It is, I think, an unreasonable custom. It is said that if a debtor gives a cheque to a creditor, and he goes to the banker with it a few minutes before the clearing hour, and the banker does not get it paid on that same day, the creditor may be in a worse situation than if he had paid it in on the following morning, which, according to the general rule, he might have done. The custom must, however, be stated in one of these two ways, either the banker by taking the bill makes it his own and must present it, perhaps, within a few minutes after he has received it, or bear the whole risk of the nonpayment of it, which is unreasonable; or the custom is to be regarded as evidence of a special direction to the banker, by the customer, to pay in the cheque at a certain time, and if it is not paid in, the banker is liable for his negligence in not complying with the directions of his customer. This latter mode of stating the custom brings the case to that which I mentioned in the course of the argument, of a bill directed by the principal to be presented before the last hour of the day on which it becomes due. This I consider to be the whole effect of the evidence. I must say that I think it infinitely better to abide by the general rule, as between debtor and

1833.
BODDINGTON
v.
SCHLENCKER.

creditor; that the creditor has the whole of the next day in which to present his cheque. The rule must therefore be made absolute, because the case was not properly presented to the jury.

Rule absolute without costs.

The KING v. The HUNGERFORD MARKET COMPANY.
In the matter of JOHN GOSLING.

A tenant whose term had expired was held to be entitled to compensation for good-will, and for the chance of obtaining a renewal, under the Hungerford Market Act.

THIS was an application for a mandamus, founded upon the Hungerford Market Act (a). The premises in respect of which the question arose were a part of the Hungerford estate, and were inserted in the first schedule of the act.

In Michaelmas term last *F. Kelly* obtained a rule nisi for a mandamus to the Company, to issue their warrant to the high bailiff of Westminster, requiring him to impanel a jury for the purpose of assessing the damages, and recompence to be given to *John Gosling*, by way of compensation, for his estate and interest in a certain messuage late in his occupation, and for the good-will of the trade attached thereto, and for the loss, damage, or injury in respect of any interest whatsoever for good-will, improvements, tenant's fixtures, or otherwise, which the said *John Gosling* hath sustained, or may sustain, by reason of the passing of the said act, and of the taking of the said messuage or tenement and appurtenances by the said Company. The affidavits filed by the prosecutor stated as follows :—

The Rev. *Henry Wise* demised the house in question to *Thomas Day* for 14 years, from 25 March, 1818, at the rent of 80*l.* *Day*, in February, 1823, sold the lease and the good-will of the trade carried on there to *Gosling*, and shortly afterwards the lease was assigned to him. Alterations and improvements were made in the house by *Gosling*, who, in April, 1830, received a letter from the surveyor of the Company, stating that they were desirous of treating with him for the purchase of his leasehold in-

(a) *Ante.*

terest. The lease expiring at Lady Day 1832, an action of ejectment was brought by the Company, and he was turned out of the possession of the house. At the time of the passing of the act he carried on the business of a pastry-cook, and by the passing of the act he was unable to sell the lease and good-will of the premises. It was the uniform custom on the Hungerford Market estate never to turn out a tenant upon the expiration of his lease, unless he was of a disreputable character.

The following facts were stated in the affidavits filed on behalf of the Company:—

In the indenture of lease granted by Mr. *Wise* to *Day*, there was a covenant on the part of the tenant to repair the premises, and at the end of the term to yield up the same, together with all fixtures, articles, and things mentioned in the schedules to the said lease, and all other fixtures that might be affixed to the premises, together with all and every the improvements that might be made to the said premises. There was also a covenant not to underlet without the consent, in writing, of Mr. *Wise*; and in the lease was also contained the usual power of entry upon breach of covenant. The Company had purchased and had taken a conveyance of Mr. *Wise*'s interest in the premises. Mr. *Wise* never granted any lease without an actual valuation, and a reference to the current annual value of the premises at the time of such leasing.

Sir *J. Scarlett* and *Follett* now shewed cause. Mr. *Wise*, before the passing of the act, had inherited from his ancestors considerable property, part of which was let on leases, and part to tenants from year to year. It cannot have been the intention of the legislature to give compensation to the tenant in such a case as this, for the consequence of such a construction of the act would be, either that Mr. *Wise* is prevented by the act from obtaining from the Company the full value of his estate, or the Company having purchased from Mr. *Wise*, upon the supposition that the termor's interest wholly expired with his lease, will be

1833.

 The KING
 v.
 HUNGERFORD
 MARKET
 COMPANY.

1833.

 The KING
 v.
 HUNGERFORD
 MARKET
 COMPANY.

ultimately obliged to pay more than the full value of the property. It cannot have been the intention of the framers of the act to place Mr. *Wise* under such circumstances as to prevent him from receiving the full value of the land. [*Parke, J.* Is the landlord at all affected? The Company must give him the full value of the land: if they cannot contract with him the sum must be assessed]. In the case of the landlord no power is given, as in this case, to have the value of the land assessed; the act of parliament only gives the Company a power to contract with Mr. *Wise*. [*Parke, J.* Your argument is, that the former decision is wrong, on the ground of hardship on the landlord. The only hardship in this case is, that the Company pay for the good-will, but that is the price they pay for the great power and privileges the legislature has conferred upon them]. Here the Company exercise no power. It may be said that the 19th section applies to this case. The class of persons mentioned in that section are contra-distinguished from those mentioned in the first schedule of the act, and this house is one of those enumerated in the first schedule. The 19th section cannot, therefore, apply to this case; nor is it affected by the 17th section, which evidently contemplates that the Company have put an end to the term by the notice there pointed out(a). Suppose the case of a

(a) The 17th section was as follows: "That every lessee or tenant for years or at will, mortgagee, and every other person in possession of any messuages, &c. which shall be purchased by virtue and for the purposes of this act, shall deliver up the possession of such messuages to the said directors of the said Hungerford Market Company, or to such person or persons as they the said directors for the time being shall appoint, to take possession of the same, upon having three calendar months' notice from the said directors for the time

being, or the person or persons so appointed by them, to quit the same at such times as shall be required by such notice, they the said directors making such satisfaction or compensation to every such tenant or lessee as aforesaid (except a mortgagee) in case he or she shall be required to quit before the expiration of his or their term in the premises, as to the said directors shall seem just and reasonable; and in case any dispute or difference shall arise touching or concerning the same, such satisfaction and compensation shall

party having a lease for 21 years, which would expire in four or five years, could this party set up against his landlord an expectation of a renewal derived from the custom of his former landlord? In computing what the Company should pay to Mr. *Wise*, were they to ask the tenants what were their expectations of a renewal upon the determination of their lease? It is sworn that Mr. *Wise* never did grant a lease without a survey of the alterations and improvements made, and the terms of the lease were regulated accordingly; yet the tenant now comes and claims of the Court compensation for the loss of his expectation of a renewal. Here the tenant has covenanted at the end of the term to yield up the premises, with all fixtures, alterations, and improvements, &c. and has also covenanted not to assign or underlet. How then can compensation be claimed at the end of the lease for the loss of the premises? This is precisely the same case as *Ex parte Wright (a)*. There it was agreed that the tenancy should be determined on three months' notice, and that the premises should not be underlet. [*Parke, J.* The agreement there was made with reference to the act, and the Court acted under the impression that better terms had been made by Mr. *Wise*.] To make this

1833.

 The KING
 v.
 HUNGERFORD
 MARKET
 COMPANY.

be settled and ascertained by a jury in such and the like manner as the satisfaction and compensation to be made by the said Company or their directors, for the purchase of any messuages, &c."

The 19th section was as follows: "That all or any person or persons, tenant or tenants for years or from year to year, or at will, occupier or occupiers of all or any part of the said old market, &c. forming the said estate, called Hungerford House or Hungerford Inn, or therewith contracted to be purchased by the said Company, who shall or may sustain or be put to any loss, damage or injury, in respect of any

interest whatsoever, for goodwill, improvements, tenants' fixtures, or otherwise, which they now enjoy, by reason of the passing of this act, shall and may have and receive all and every such benefit and advantage by way of compensation from the said Company, for every such loss, damage or injury, by such and the same means as are herein enacted and provided for and in respect of the person or persons, tenant or tenants of all and singular the hereditaments in the first schedule to this act contained."

(a) 2 B. & Ad. 349.

1833.

 The KING
 v.
 HUNGERFORD
 MARKET
 COMPANY.

rule absolute would be to alter the terms of the lease between Mr. *Wise* and his tenants. It would be making a tenant, who takes a lease upon an express covenant to yield up the premises, not bound by that covenant.

F. Kelly, *contra*. There seems to be no distinction between this case and that of *Still*, which was determined a few days ago. [*Parke*, J. All that was before the Court in that case was a lease which had expired by efflux of time. The Court there thought that the case was not to be distinguished from the case of a tenancy from year to year, and that the same clause embraced both.] The only apparent difference between this case and *Still's* (a) is, that here there is a covenant not to underlet. That covenant does not, however, now exist. The covenant is contained in the lease to *Day*, and is a covenant not to assign without licence in writing from the lessor. *Day* did assign without licence, and by that act broke the covenant, *Paul v. Nurse* (b). As to the case of *Ex parte Wright*, which has been adverted to; when the act was in contemplation, Mr. *Wise*, with a view of making terms with the Company himself, sent round his agent to his tenants, and an agreement was entered into between him and some of his tenants; that, after the expiration of the tenancy, they should hold on upon the same terms, until possession was required for the purposes of the act; and the Court decided, that as an agreement had been made by the tenant with reference to the act, he could not claim compensation. In this case we find a substantial lease existing down to the present time. [*Parke*, J. You cannot claim compensation for the fixtures at the end of the term, but perhaps you would view it thus, that if the tenant had improved his premises, he would probably have obtained an advantageous renewal of the lease.] It may be that by the assignment the present tenant is relieved from that covenant; but if

(a) *Ante*, p. 404.

(b) 2 M. & R. 595.

that covenant affects the value of the right of the tenant, it is a question for the consideration of the jury. Supposing this rule is made absolute, we should be bound to give the lease in evidence; and if it appeared that the fixtures belonged to the landlord, then we should be entitled to compensation for the good-will only. Under every view of the case the tenant is entitled to compensation for the good-will.

1833.

 The KING
 v.
 HUNGERFORD
 MARKET
 COMPANY.

DENMAN, C. J.—It seems to me that all the difficulty arising upon this act, the Hungerford Market Company have brought upon themselves. They have framed an obscure clause, which, in my opinion, ought to receive a liberal construction. Two sections, the 17th and 19th, have been cited. I can see no way of extending the provisions of the 19th section beyond those of the 17th, except by holding, as in *Ex parte Farlow*, that the terms of the former intended to give the tenant compensation for the loss of good-will and other damage which he may sustain by being deprived of the chance of a beneficial renewal of his lease. It is true that this interest is slight and feeble, but still it is *some interest*.

LITLEDALE, J.—If the construction put on the 19th section by the Company were allowed, the tenant in this case would have no right to recover for good-will, or any thing else; for the present lease has expired, and therefore the tenant does not come within the 17th section. The distinction between the 17th and 19th sections is this; the former relates to a lease which has not expired, the latter goes further, and seems to contemplate a person whose term and interest has ceased; for the words are, “all or any person or persons, tenant or tenants for years, from year to year or at will, occupier or occupiers of all or any part of the said old market, &c., who shall or may sustain or be put unto any loss, damage, or injury, in respect of

1833.
The KING
v.
HUNGERFORD
MARKET
COMPANY.

any interest whatsoever for good-will, &c., which they now enjoy." The act contemplated that persons, though not required to quit before the expiration of their terms, might sustain injury. Such persons must, therefore, have compensation. I see no objection to a mandamus to assess compensation for the loss of the good-will only.

PARKE, J.—*Ex parte Farlow* is distinguishable from *Ex parte Wright*, for the latter case was determined on the ground that the agreement entered into by the tenant with his landlord, had reference to the yielding up of the premises for the purposes of the act. If the 19th section is obscure, it is the fault of the Company that it is so. According to the usual rule the section ought to be construed against the interest of the Company. There is a distinction between this and the preceding cases with respect to the fixtures, as it appears that the tenant in this case has no legal right to them. That part of the 19th section which gives the tenant compensation for the loss of his fixtures contemplates his having a legal right to them. The tenant in this case is entitled to have it inquired whether he has lost any thing for good-will or otherwise. A mandamus may therefore be sent, requiring the Company to assess compensation for the loss of good-will, or the chance of a beneficial renewal of the lease. If the party, from the improvements made, had a better chance of a beneficial renewal, he may recover something for that.

Rule absolute.



1833.

In the matter of **CHARLES BONNER**, Gent. one &c.

IN Michaelmas term last *Humfrey* had obtained a rule calling upon *Charles Bonner*, an attorney of this Court, to shew cause why he should not pay over to *Matthew Robinson* and *Samuel Campain*, executors of *William Stokes*, deceased, the three several sums of 258*l.*, 50*l.* and 50*l.* From the affidavits filed on behalf of the executors, the following facts appeared:—On the 7th February, 1828, *Stokes* agreed to purchase of one *Decamps* a farm, and having paid part of the purchase money to him, the sum of 258*l.* remained due. *Bonner* was employed as his attorney by the vendor, and he also examined the title and prepared the conveyance for the vendee. *Stokes* having learnt from *Bonner* that the conveyance was prepared and the purchase money wanted, on the 10th February paid *Bonner's* clerk the sum of 258*l.*, on which occasion *Bonner's* clerk promised that the title-deeds should be sent to *Stokes*. *Bonner* became bankrupt, and *Decamps*, the vendor, denied having received the money from *Bonner*, and compelled *Stokes* to pay the money over again. *Stokes* frequently applied to *Bonner* for the money and received evasive answers, and expended 50*l.* in litigation, and lost 50*l.* in the shape of interest. The affidavits filed on the part of *Bonner* stated that he was employed by both parties; that he had received the sum of 258*l.*, and had placed the same, when received, to the credit of *Decamps*, and that he had subsequently become bankrupt, and had obtained his certificate; that he had never requested the purchase money to be paid to him. Upon the application for the rule it was stated, that a similar rule had been made absolute against the same parties (*a*).

Where an attorney, employed by both vendor and purchaser, receives the purchase money and omits to pay it over, and afterwards became a bankrupt, and obtains his certificate, the Court will not make a rule compelling him to pay the amount, unless fraud be shown: otherwise if there be fraud.

(*a*) In Hilary term, 1832, *Humfrey* obtained a rule nisi, calling upon *Charles Bonner* to shew cause why he should not pay to *William Plowright* and *Thomas M. Booth*, the executors of *Thomas Plowright*,

deceased, 200*l.* with 40*l.* for interest thereon, and also 50*l.* with the costs of the application. From the affidavit filed when this rule was granted, it appeared that in September, 1823, *Thomas Plowright*

1833.

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In re
BONNER.

Campbell, S. G. and John Williams, now shewed cause. The debt might have been proved under the commission by either the vendor or the purchaser, and the bankrupt is discharged by virtue of the 126th section of 6 Geo. 4, c. 16. In *Ex parte Culliford (a)*, the Court refused to compel an attorney to pay a sum of money received in his character of attorney, he having obtained a certificate under his bankruptcy. Here the only ground for the application is, that the party fills the character of an attorney. [*Parke, J.* You do not contend that the Court could not punish an attorney of the Court for misconduct, by making him refund money fraudulently obtained.] The Court may strike an attorney's name off the rolls, but will not compel him to satisfy a demand from which he is discharged by law; *Rex v.*

was possessed of property previously mortgaged for 400*l.*, viz. to one Mrs. Cam for 200*l.*, and to the trustees of one *Ashwell* for the remaining 200*l.*, and being desirous of raising another sum of 200*l.*, employed *Bonner* to procure him 600*l.*, in order that, after paying off the mortgages, 200*l.* might remain. *Bonner* borrowed 600*l.* from one *Simpson*, and after deducting 400*l.* as if it had been paid by him to Mrs. Cam and *Ashwell's* trustees, he gave *Plowright* 150*l.*, promising to account for the remaining 50*l.*, which he never did. On the 19th day of March, 1824, *Thomas Plowright* died, and by his will made *William Plowright* and *T. M. Booth* his executors. That *Thomas Plowright*, previously to his death, had told his executors that both the mortgages were paid off, and that this appeared by the bill of *Bonner*. That in 1828 the executors were applied to by the

trustees of *Ashwell* for the payment of the mortgage to them, for the sum of 200*l.*, when it appeared that *Bonner* had, subsequently to the death of *Thomas Plowright*, paid the interest thereon, having converted the 400*l.* to his own use. That *Bonner* had assured *Thomas Plowright*, in his life-time, that he had paid off *Ashwell's* mortgage, which he believed to the time of his death, but the executors had been compelled to settle with the trustees of *Ashwell*. The affidavit filed by *Bonner* stated his bankruptcy and certificate. Cause was shewn the same term, when the Court enlarged the rule for a year, upon Mr. *Bonner's* paying within a certain period 60*l.*, and undertaking to pay 50*l.* a year until the sum of 200*l.*, together with the interest from that time, was discharged. In Hilary term, 1833, the Court made this

Rule absolute.

(a) 8 B. & C. 220.

Edwards(a). In *De Bernales v. Fuller(b)*, where money was paid into a banking house for the purpose of taking up a particular bill which was lying then for payment, it was held that the holder of the bill might maintain an action for money had and received to his use against the banker, and that the banker could not place the money paid in, for the purpose of discharging the bill, to the general account of the acceptor, who had so paid in the money, and who was the banker's debtor. Upon the principle of that case, when the purchase money was paid in by *Stokes*, *Decamps* could have maintained an action for it. It was no longer the money of *Stokes*, and it does not appear whether or not *Decamps* had proved for the amount against *Bonner's* estate. If this position be not correct, at least the attorney in this case is in the same situation as an auctioneer or banker in possession of property, and is discharged by his certificate.

There is no pretence for imputing fraud in this case.

Humfrey, contra. Unless this rule be made absolute, the decision of the Court must be directly in opposition to what was decided in full Court about a year ago, upon an application made against the same party and in the same words. Admitting, for a moment, that the certificate is a bar, yet it often happens that where the Court has no direct power so to do, they will impose a penalty upon a party, rather than subject him to a greater punishment, which it is in their power to inflict; as when a party is brought up for judgment, the Court has in general no power to make him pay the prosecutor's costs, yet they frequently compel a defendant to do so, by intimating that if he does not, the Court will exercise the power it possesses of inflicting a much heavier punishment. Upon the ground of fraud alone, there is sufficient in these affidavits to support the application. The affidavit states that applications were made for the money in vain, and imputes fraud to *Bonner*

1893.

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In re  
BONNER.

(a) 9 B. &amp; C. 652.

(b) 14 East, 590, in the note.



1833.

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In re  
BONNER.

and his clerk. The clerk has made no affidavit in answer, although *Bonner* has done so. In the cases cited, it appears that the debt was proveable under the commission, but that would not appear to be the case here, as *Stokes* did not, till long after the bankruptcy, know that the money had continued in the hands of the attorney. [*Littledale, J.* If he had not been an attorney of this Court—a conveyancer, for instance—would he not have been discharged by his certificate?] It is difficult to say when the debt accrued as between *Bonner* and *Stokes*.

LITLEDALE, J.—I think that in this case the Court cannot interfere. If the attorney has committed any fraud, that must be made the ground of another application. On a former application to the Court against the same party, the case came on at the end of the term, and was not fully gone into, and it does not appear that any deliberate judgment was given by the Court.

PARKE, J.—I was not in the Court when the former case was decided. As to the general proposition, I am not disposed to disagree with the decision of the Court in that case. The Court have power to punish an officer of the Court, and may in this way make him pay money. But there must appear a clear case of fraud, not merely that there has been a nonpayment of money. We think that in these affidavits there is no fraud shewn. The claim here is the common case of a debt, which is discharged by the certificate.

DENMAN, C. J.—I was unwilling to say any thing in this case, having been engaged in a case so similar, in which I certainly thought myself very unfortunate in having the Court against me. I think that if it is sought to recover money from an attorney, by a modification of the power of the Court to impose a fine, the application should be made in another form, in order that the party may have notice.

In using our discretion, however, in discharging this rule, it should be understood that the Court consider that there is nothing stated in the affidavits amounting to fraud.

1833.


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In re  
BONNER.

Rule discharged.

MOORE, Gent. one &c. v. TERRELL and SMALE, Gents.  
two &c., and FEATHERSTONE.

**CASE** for a libel. The declaration stated that the plaintiff was an attorney in K. B., and had practised with fidelity and reputation, and had, in the course of such practice, become acquainted with the confidential affairs of divers of his clients, and received communications touching their property and other affairs, which it was his duty to retain in fidelity and confidence, and not to disclose against the will or to the detriment of his clients. The plaintiff had accordingly retained such communications, and not disclosed the same. That there had been an election of a knight of the shire of Dorset, on which occasion Lord *Ashley* and the Honourable *W. F. S. Ponsonby* were candidates, and on which occasion the plaintiff was retained by and acted on behalf of Lord *Ashley* during the examination of divers voters and persons tendering to vote at such election: Yet the defendants contriving &c. to injure the plaintiff in his reputation as such attorney, and to cause it to be suspected and believed that the plaintiff was a person unfit and unworthy of confidence as such attorney, and that he was a person who as such attorney had illegally, dishonestly, treacherously, and disgracefully disclosed communications which he had acquired professionally, and that he was a person to whom it would be dangerous to make any confidential communication as such attorney, and to injure plaintiff in his practice as an attorney, on the 22 November, 1831, composed and published in a certain

In an action for a libel, the plea justifying a charge of having disclosed confidential communication made to the plaintiff as an attorney, may be supported by proof of the disclosure of communications made to him by his clients, which are not of that strictly privileged character which would prevent his examination as a witness.

1833.  
  
 MOORE  
 v.  
 TERRELL  
 and others.

newspaper called "The Western Times," a libel of and concerning the said election, and of and concerning the plaintiff, and of and concerning him in the way of and in respect of his profession as such attorney, containing, amongst other things, the false &c. matter following of and concerning plaintiff, and of and concerning him in his profession as such attorney; that is to say, "Blandford. We are sorry to find that the town of Blandford has since the election become the scene of violent outrage. Mr. S. Smith and Mr. Moore, (meaning the plaintiff,) two attorneys, advocates for Lord Ashley, had, during the examination of the voters, disclosed many confidential communications which they had acquired professionally. The townsmen, justly annoyed at such conduct, have broken into their offices, taken all their papers and scattered them about the streets of Blandford. This is the more to be lamented as Mr. Smith, we understand, was one of the registrars of the diocese, and we fear the with intrusted to his care have shared a similar fate with his private papers. Nothing can be more disgraceful than such conduct as was pursued by these attorneys (meaning to include the plaintiff) at the election, but we regret that it should have entailed such serious consequences as we have related." By means whereof the plaintiff has been greatly injured in his reputation, and in his reputation and credit as an attorney, to his loss of divers gains and profits, which would otherwise have accrued to him in his practice of an attorney.

The defendant pleaded, in justification, the truth of this statement, that the plaintiff had disclosed certain confidential communications, averring three cases, which the plea alleged to be confidential communications. And the plea further stated that the plaintiff had taken frivolous objections respecting the voters, and had conducted himself in such a manner that the townsmen of Blandford had been justly annoyed at the disclosures he had made, and for that reason attacked his house. The three cases above referred

to were these: first, that *W. B.* and *J. B.* had borrowed money of the Blandford bank upon mortgage of their joint property, and had upon that occasion employed the plaintiff, being an attorney, to conduct and negotiate the said mortgage, and that the plaintiff in such employment had negotiated the mortgage for *W. B.* and *J. B.*, and had received in the course of such employment divers professional and confidential communications touching the said mortgage, and the sum borrowed thereon. That *W. B.* and *J. B.* at the election tendered their votes respectively for *Mr. Ponsonby*, and were in the presence of plaintiff examined touching their votes; and thereupon plaintiff, acting as attorney on behalf of Lord *Ashley*, did without the consent of *W. B.* and *J. B.*, and during their examination, disclose to *J. H. F.* and divers other persons the same mortgage transaction and divers details and particulars relative thereto, and divers of said confidential communications, and declared the amount of the mortgage, and that the interest payable on the mortgage was equal to the rent, which in the plea is denied. Secondly, That the plaintiff was professionally employed by Sir *J. W. S.* in the management of his affairs, and in the course of his employment became professionally and confidentially acquainted with the title of Sir *J. W. S.* to certain property in the county of Dorset, and especially to the exercise of a power to grant a freehold lease of part thereof, and which power had been exercised by granting a freehold lease to one *J. C.*, and *J. C.* afterwards came to vote for *Mr. Ponsonby*, when plaintiff, without the permission either of Sir *J. W. S.* or of *J. C.*, disclosed divers particulars touching the title of the said freehold lease, and touching the right of Sir *J. W. S.* to grant the same, which particulars had been professionally and confidentially made known to the plaintiff as aforesaid. The third case stated was that of a mortgagor, similarly circumstanced with the first quoted. The replication protested that the pleas were not sufficient in law; and replied *de injuria sua propria*. At the trial before *Parke, J.*

1833.

MOORE  
v.TERRELL and  
others.

1833.



MOORE

v.

TERRELL and  
others.

at the Dorset spring assizes, 1832, the defendants gave evidence of the three instances in which they charged the plaintiff with having improperly availed himself of knowledge obtained by him as an attorney. In the cases of the mortgages the plaintiff had been employed on both sides. Some evidence was also given of the alleged frivolous objections. It was disputed whether the latter part of the plea was sufficiently proved, namely, that part which alleged, that in consequence of plaintiff's conduct, the townsmen, justly annoyed, had attacked his house: but it was not distinctly left to the jury to say whether the actors were townsmen, *i. e.* inhabitants of Blandford. The jury found a verdict for the plaintiff, damages 100*l.*

In Easter term following, *Crowder* obtained a rule nisi for a new trial, on the ground that the learned judge, in summing up the evidence, had too much narrowed the sense of the words, "professional and confidential communications," and that he had treated them as synonymous with the cases of privilege from disclosure, in which the attorney, when called as a witness, cannot be compelled to disclose facts communicated to him by his client; as appears from his observation that there had been a difference of opinion in *Clark v. Clark(a)* and *Williams v. Mundie(b)*, on the question of privileged communications to an attorney, but that he was inclined to agree with the principle laid down in *Williams v. Mundie*.

*Coleridge*, Serjt. and *Burston* now shewed cause. The libel links together the misconduct of the plaintiff and the annoyance and consequent outrage of the townspeople of Blandford. It was, therefore, necessary to shew that the parties who in fact committed the outrage were the townsmen of Blandford; but there was a total failure of proof upon that head. With regard to the point, as to the privileged communication, this case does not range itself under any of the decided cases. To take the instance of *J. C.* the plaintiff and *J. C.* had never stood in the

(a) 2 M. &amp; M. 3.

(b) 1 Ry. &amp; M. 34.

relation of attorney and client, and there was, at all events, no breach of confidence which any party could notice but Sir J. W. S. With respect to the other cases, the circumstances under which the plaintiff was employed render it impossible that any communications made to him in the course of that employment could be in the nature of privileged communications, for he is employed in the transaction by both parties. It is true he is paid by the mortgagor; but it is the usual course in such matters for the party wishing to lend money on mortgage to employ the attorney to find a borrower, and the borrower or mortgagor ordinarily expresses his confidence (a) in such attorney, and desires him to draw the usual deed, for which he pays him. Could it be said in such a case, that if the mortgagor communicated to the attorney the circumstance that the title was defective, or that if that fact were discovered upon perusing the deeds placed in his hands by the mortgagor, as his, the mortgagor's attorney, the attorney would be bound not to communicate that fact to the mortgagee? There could not be any confidence supposed to be placed in him by the mortgagor. There have never been any decisions fixing a limit to the cases in which communications to an attorney are privileged; *Cromack v. Heathcote* (b), *Hughes v. Biddulph* (c), *Doe v. Harris* (d). [Denman, C. J. Upon these pleadings the case cannot turn upon any nice point as to whether certain communications were privileged or not. Parke, J. In consequence of the case at Gloucester, and another case, *Tindal, C. J.*, Lord Lyndhurst, the Chancellor, and myself, had a consultation,

1833.  
  
 MOORE  
 v.  
 TERRELL and  
 others.


(a) The usual course is for the mortgagee to employ the attorney, because it is the mortgagee, who parts with his money and obtains a security, who is interested in the solidity of that security, and for the mortgagor to pay the attorney, because he is, generally speaking,

the party accommodated by the transaction.

(b) 2 Bro. & B. 4.

(c) 4 Russ. 190.

(d) 5 C. & P. 592. See also *Baugh v. Cradocke* 1, Moo. & R. 183, and *Cleve v. Powel*, ibid. 228.


1833.  
  
 MOORE  
 v.  
 TERRELL and  
 others.

and we thought that the privilege of the client extended far beyond communications in respect of a suit.] The proposition which must be contended for is, that not only is this a breach of confidence, but also that it was made under circumstances most disgraceful to the plaintiff, which is not proved by any part of the evidence.

*Crowder*, contra. It was not intended to raise the question as to confidential communication, as the ground of the motion was, that the learned judge had treated this case as a case of privileged communication, and having the case of *Clark v. Clark* before him, stated that this did not fall within that case. This was not the proper criterion by which to try the case. It should have been left to the jury to say whether this was a *disgraceful* communication or not. There are many cases, such as that of a physician, disclosing to the world facts communicated upon the faith of professional secrecy, in which there is nothing like a strictly privileged communication, but in which it may be justly said that the conduct of the party who communicates is disgraceful. In this sense the knowledge which an attorney obtains from having the affairs of a party laid before him for the purpose of enabling him to draw a deed, may be termed a confidential communication. In *Rex v. Upper Boddington (a)* upon a question of settlement, *Hands*, an assignee of a mortgagee, was subpoenaed by subpoena duces tecum to produce the mortgage deeds, and appeared, but refused to produce them. Upon this the respondents attempted to give secondary evidence of the contents, by producing an abstract of the deeds which had been made by a clerk to the solicitor of the mortgagee, and called the clerk to verify the abstract. The Court of Quarter Sessions refused to allow the clerk to be examined. Mr. Justice *Bayley* says, "The abstract was made by the attorney of a former mortgagee of the premises, of which the deeds constituted the title, and those deeds had come

(a) 8 Dowl. & Ry. 732.

into Mr. *Hands*' possession, as the assignee of that mortgage. It was, therefore, an abstract made by an attorney for the purposes of Mr. *Hands*, and as it remained in that attorney's possession after Mr. *Hands* became the mortgagee, it must be taken to have been deposited there by him, and for his use and benefit, and the attorney was not at liberty to produce it. If so, it follows that the attorney could not be at liberty to give evidence of the contents either of the deeds or the abstract; because the whole of those contents were a confidential communication from the client to his attorney, and therefore privileged from disclosure; and as to the attorney's clerk, he stood in precisely the same situation as his master. I think it would be opening a door to great abuse of the confidence necessarily reposed by the client in his adviser, if we were to hold such evidence as this admissible." There he goes the whole length of saying that this is a privileged communication, but all that is now contended for is, that it is a confidential communication which it is disgraceful to disclose.

1833.  
  
 MOORE  
 v.  
 TERRELL and  
 others.

*Cur. adv. vult.*

In this term DENMAN, C. J. delivered the judgment of the Court. After adverting to the pleadings and the evidence, his lordship said, "The whole class of cases on this subject will be found in my Lord *Tenterden*'s judgment in the case of *Clark v. Clark* (a). At the trial, and again in support of the rule, it was contended that the criterion employed was improper, inasmuch as an attorney might be bound to state that in a judicial proceeding which would otherwise be confidential as between himself and his client. As to the three cases alleged, of breaches of confidence in the attorney; one was, that his own client had no power to grant a lease for life in respect of which the vote was tendered. That knowledge would fall within the rule of a

(a) 3 Moody & Malk. 5.



1853.  
MOORE  
v.  
TERRELL and  
others.

privileged communication in its narrow sense; but the two others were of facts of which he had become informed undoubtedly as an attorney, but not exclusively as an attorney acting for his client. He had been concerned on both sides in two mortgage transactions, and acting as agent at the election he objected to the votes of the mortgagors, partly on the ground that their property was mortgaged, which the voters did not dispute, but established their right to vote by shewing a sufficiency of property above the mortgage money. We think, however, the opinion of the jury ought to have been taken whether these were or were not confidential communications acquired professionally, in the more enlarged and popular sense of the word. And although it was contended in support of the verdict that part of the justification failed, because, even if they bore that character, the disclosure of them could not be said to have justly annoyed the plaintiff's townsmen, or be called disgraceful, which indeed the amount of damages may seem to prove the opinion of the jury to be, we think the question should have been submitted to them whether the fact was proved, and whether, if it was proved, the inference was correctly drawn. Another disputed fact at the trial was, whether the outrages were committed against the plaintiff's property by the inhabitants of the town or by strangers. This was doubtless an essential part of the plea, and ought to have been proved; but there was some evidence relative to it proper to be submitted to the jury, and their verdict was not separately taken on the points. Unless, therefore, the defendants feel that some reparation is due to the plaintiff, and should offer to him something which the plaintiff should deem it prudent to accept, a new trial must be had.

Rule absolute.



1833.

## JOHN RICHARDSON v. WATSON.

**ASSUMPSIT** for the use and occupation of two closes of land, situate in the parish of Kirton, in the county of Lincoln. At the trial before *Bayley, B.*, at the Lincoln spring assizes, 1832, a verdict was found for the plaintiff for 12*l.* 11*s.* 7*d.*, subject to the opinion of this Court on the following case.

The lessor of the plaintiff was entitled, as heir of *William Richardson*, (who had demised the two closes from year to year to *Watson*.) to recover 12*l.* 11*s.* 7*d.* for the half year's rent of those closes, unless they passed by the will of *William Richardson* to one other *John Richardson*, the great nephew of the testator. By this will, dated 17th April 1827, after giving and devising certain estates at Imingham, East Halton, Killingholme, and Harbrough, to his wife (now his widow,) *Catherine* for life, and subject thereto his estate at Imingham to his great nephew, *William Richardson*, in tail, and his estates at East Halton, Killingholme, and Harbrough, to him in fee, the testator gave and devised all that his messuage or tenement, closes, lands, hereditaments and real estates, situate, lying, and being at Hibaldstowe, in the county of Lincoln, which were then in the occupation of *John Watson*, unto and to the use of his great nephew *Percival Richardson*, his heirs and assigns, and then devised as follows:—

“I give and devise all that my messuage or tenement, closes, lands, hereditaments, and real estates, situate, lying, and being at Kirton, in the said county of Lincoln, which are now in the occupation of *Joseph Atkinson*. And also the close in Kirton aforesaid, now in the occupation of the said *John Watson*, unto and to the use of my said great nephew *John Richardson*, his heirs and assigns, for ever. I give and devise all that my messuage or tenement, closes, lands, hereditaments, and real estates, situate, lying, and being at Kirton aforesaid, which are now in the occupation

*A.* having two separate closes in Dale, in the occupation of *B.*, devises to *C.* the close in Dale in the occupation of *B.* *C.* cannot entitle himself to both closes by shewing that *A.* supposed that the property occupied by *B.* consisted of one close. Nor is this a case for election. The devise is void for uncertainty.

1833.

RICHARDSON

v.

WATSON.

of *Thomas Curtis*, unto and to the use of my said great nephew *Thomas Richardson*, his heirs and assigns, for ever. I give and devise all that my messuage or tenement, *closes*, lands, hereditaments, or real estates, situate, lying, and being at Kirton aforesaid, which are now in the occupation of *Joseph Wharton*, unto and to the use of my said great nephew *Richard Richardson*, his heirs and assigns, for ever."

For two or three years previous to and in the year 1825, and thence until the death of the said *William Richardson*, the said *John Watson* occupied *two closes* in the parish of Kirton, as tenant of the said *William Richardson*, being the same two closes for the use and occupation of which the present action was brought. The two closes have always respectively been called 'Low Farwells,' and 'Low Sweet Hills,' and contain each about eleven acres. Supposing a line drawn from east to west, this was the situation of the closes on the line: First, a number of closes forming the body of *Atkinson's* farm, then the Low Farwell, next another close in the occupation of *Atkinson*, then two successive closes in the occupation of *Thomas Curtis*, then another close in the occupation of *Atkinson*, and beyond and adjoining this last was the close called Low Sweet Hills. Evidence was given by the defendant of a certain will made by the testator in 1825, in which the testator devised his lands &c. in Hibalston and Kirton, to trustees, to their use, upon the trusts in the will declared; and amongst other portions 'as to, for, and concerning all that messuage or tenement, with the closes, lands, and hereditaments, situate, lying, and being in Kirton aforesaid, now in the occupation of *Joseph Atkinson*, together with the close in Kirton aforesaid, occupied by the said *John Watson*, upon trust for my said great nephew *John Richardson*, when he shall attain the age of 23 years, and for the heirs of his body lawfully issuing.'

The attorney who made the will of 1825, but did not make the will of 1827, stated that he received instructions

in writing from the testator for the will of 1825, which he produced, and which, amongst other instructions, contained the following: "I also wish the farm in *Joseph Atkinson's* occupation to be the property of *John Richardson* my great nephew, taking also the land in Kirton occupied at this moment by Mr. *Watson*, (all) only to be entered on at 23." The witness stated in explanation of his having mentioned only one close in the occupation of *Watson* in the will, that the testator gave him certain verbal instructions for the will, and in those verbal instructions described the land in the occupation of *Watson* as a 'close,' but added, that he hardly knew what *Watson* occupied; that the will was made from the written and verbal instructions. The witness further stated, that from what passed, he understood it to be the testator's intention to give all the land in Kirton in the occupation of *Watson* to his great nephew *John Richardson*; that in consequence of the testator's not being certain what land *Watson* occupied, a person of the name of *Neal*, who was supposed to know the testator's land, was called in and asked by the witness, in testator's presence, whether the land in the occupation of *Watson* was in one close or two, and that *Neale* said it was all in one close; and that he witness, in consequence of this information, described it in the will as above-mentioned. The closes in question had formed a part of *Atkinson's* farm 24 years before and till they came into the possession of *Watson*. The learned judge thought this evidence could not be submitted to the jury, and directed them to find a verdict for the plaintiff, damages 12*l.* 11*s.* 7*d.*

The questions for the opinion of the Court are,

1. Whether the evidence on the part of the defendant ought to have been received?
2. Whether the jury ought, upon the whole admissible evidence, to have found a verdict for defendant?
3. Whether the evidence ought to have been submitted to the jury for them to find a verdict for the defendant or for the plaintiff, according as they should find that it was

1833.

RICHARDSON  
v.  
WATSON.

1833.  
  
 RICHARDSON  
 v.  
 WATSON.

or was not the intention of the testator to give both the closes to his great nephew, *John Richardson*?

4. Whether the devisee, the testator's great nephew *John Richardson*, might not be entitled under the devise to one of the two closes, and if so, whether the heir or devisee should have the option?

*Amos*, for the plaintiff. The statute of wills and the statute of frauds both require that the will of the testator should be in writing, and the judgment of the Court must proceed upon the meaning of the words which are used in the will. It is not for the Court to say what the meaning of the testator was, if the words used by him will not bear that interpretation. *Tindal*, C. J., in his judgment in *Miller v. Travers* (a), mentions two classes of cases in which parol evidence is admissible; first, "where the description of the thing devised or of the devisee is clear upon the face of the will, but upon the death of the testator it is found that there are more than one estate or subject-matter of devise, or more than one person whose description follows out and fills the words used in the will. The other class of cases is that in which the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular." Here if there had been any ground for inferring that the testator had any particular close in view, this case might have been considered as within the first class of cases, and parol evidence might have been admissible. There is, however, no ground for any inference of that sort. The maxim *ambiguitas verborum latens, verificatione suppletur*, is certainly laid down in broad and general terms in Lord *Bacon's* works (b), but if the illustrations of the maxim given by Lord *Bacon* are examined, they will be found to range themselves within the two classes mentioned by *Tindal*, C. J. In *Druce v. Denison* (c), Lord *Eldon* says, "When a man devises to

(a) 8 Bingh. 244.

(c) 6 Ves. Jun. 597.

(b) *Bacon's Works*, vol. xiii. 192.

his son *John*, and happens to have two sons of that name, supposing one to be dead, there is a latent ambiguity, letting in parol evidence, but parol evidence perfectly consistent with that described in the instrument." This decision is in accordance with the judgment in *Miller v. Travers*. *Dowset v. Sweet* (a) is a case decided upon the same principle. There the testator bequeathed a legacy to *John* and *Benedict*, sons of *J. S.*; *J. S.* had two sons, *James* and *Benedict*, but no son of the name of *John*, and it was held that *James* should take the legacy.

1833.  
  
 RICHARDSON  
 v.  
 WATSON.

To constitute a case of election, the presumption of an intention to give an election must arise upon the face of the will or instrument itself; as where a man grants 18 acres out of his wood, containing 100 acres, or where a testator devises land at *S.* and he is possessed of land at *North* and at *South S.*

The declarations by the testator in 1825 are inadmissible to explain the will of 1827, inasmuch as these declarations were made at the time of making the will in 1825, in which the property is not devised in the same manner as by the will of 1827; *Thomas v. Thomas* (b).

*N. R. Clarke*, contra. The Court will put such construction upon the words of the will as will give effect to the intention of the testator, without reference to any extrinsic evidence, except that which shews that there are two closes. The argument on the other side does not apply to this case. It would have been applicable if the words in the will had been, I give *one of the two closes* in the occupation of *Watson*. The testator says *the close* in the occupation of *Watson*, by which is clearly meant all the land in *Watson's* occupation, and there is nothing in the will indicative of a contrary intention. The testator gives first the farm in the occupation of *Atkinson* to his great nephew. These two fields are contiguous, and had been formerly part of the farm occupied by *Atkinson*. After the devise of the farm, which is the substantive de-

(a) Ambler, 175.

(b) 6 T. R. 677.

1833.  
  
 RICHARDSON  
 v.  
 WATSON.

vise, there is the devise of the close in the occupation of *Watson*. The testator must have intended to give both those fields when he used the word *close*. The meaning of "close" is not confined to a field inclosed by hedges. A common, a piece of waste ground, or part of a forest, may be described as a close. In numerous cases property not specifically described in the will has been held to pass by it. In *Press v. Parker* (a) a coal-cellar, not included in the description, was held to pass to the devisee. Although in the case of *Doe v. Oxenden* (b), *Mansfield*, C. J. thought that evidence ought not to be received to extend the operation of the will to an estate to which the words of the devise did not strictly apply, yet from the observations made by him in delivering judgment it may be inferred, that the Court would have admitted the evidence if in that case the devise would otherwise have had no operation. Therefore that case is an authority in favour of the claim of the present defendant, for if the evidence of intention be not received, and this be not a case for election, the devise will fail to have any operation whatever. In *Lane v. Earl Stanhope* (c) leasehold property was held to pass under the word "farms." This case shews the length the Courts will go to effectuate the intention of the testator. Had the testator intended one field only to pass, he would have said a close, and not the close in the occupation of *Watson*.

This case comes within the second class of cases mentioned by *Tindal*, C. J., in *Miller v. Trivers*: the description is true in part, but not true in every particular. There are many other cases upon this subject, although none are precisely in point. In *Goodtitle v. Southern* (d), by a devise of "all that my farm, called Trogue's Farm, now in the occupation of A. C.," lands, parcel of Trogue's Farm, not in the occupation of A. C., were held to pass. [*Parke*, J.: In that case the former part of the description was correct, and the latter part was

(a) 2 Bingh. 456.

(c) 6 T. R. 345.

(b) 3 Taunt. 156.

(d) 1 M. & S. 298.

rejected, on the ground that *falsa demonstratio non nocet*]. In *Doe v. Roberts* (a), *Bayley, J.* says, "If the description is not precise; if you cannot satisfy the will, unless additional property passes besides that which is described, then you must presume that the testator intended to pass that property, and that his description is inaccurate." It has been contended that declarations by the testator are not evidence of his intention to devise, unless they are made at the time of making the will. The instructions for the will made in 1825, and what occurred at that time, are not offered in evidence of the mode in which the testator intended to dispose of the property, but merely to shew that by the expression in the will, "the close," the testator intended to comprise all the land occupied by *Watson*.

1833.

RICHARDSON  
v.  
WATSON.

*Amos* in reply. "Close," in pleadings, may mean an uninclosed piece of ground; but here the word is used in a popular sense, and means a field. In *Goodtitle v. Southern* the devise was of *all* that farm called Trogue's Farm, and the words of the will could not be satisfied unless the whole had passed; and if that part of the description which was untrue was rejected as useless, enough would remain to carry the estate to the devisee. *Lane v. The Earl of Stanhope* turned upon the meaning of the word "farm." In *Press v. Parker* it was held, that the coal cellar was parcel of the messuage, and therefore passed with it to the devisee. It is said, that this case is within the second class of cases mentioned by Chief Justice *Tindal*, in *Millar v. Travers*; but to bring a case within that class you must be able to strike out that part of the description which is incorrect.

DENMAN, C. J.—It appears to me that the ambiguity in the will is clearly a latent ambiguity capable of being explained by parol evidence. Evidence has been produced,

(a) 5 B. & Ald. 407,



1833.

RICHARDSON  
v.  
WATSON.

but I think that evidence does not at all explain what the testator meant, whether he intended the one or the other of the closes to pass by his will, and to be enjoyed by the devisee. The devise therefore is void, and the plaintiff, as heir-at-law, must recover the premises. Nor is this a case of election; for there can be no election, except where there is a clear intention that out of a mass some portion shall be chosen. Assuming that the evidence as to the title of the property is admissible, the remainder of the evidence is, that the testator gave verbal instructions and described the property as *a close* in the occupation of *Watson*, but intended to give all that was occupied by *Watson* in that parish. It is, therefore, not possible to say that the testator meant to give either the one or the other of the closes in the occupation of *Watson*.

LITLEDAL, J.—I am also of opinion that the parol evidence does not shew which close the testator intended to devise. The evidence only shews that he intended to give something in the occupation of *Watson*. In *Goodtitle v. Southern*, Trogue's Farm was a certain description sufficient to pass the property, and whether it was or was not in the occupation of the person named in the will could not make any difference, as the false description afterwards could not vitiate the previous correct description. The testator in this will uses the word "closes" several times, therefore the word "close" cannot be said to mean more than one close. Then I apprehend that this is not a case of election. A party has an election where it appears on the face of the instrument that there is something from which the selection can be made, as in the case mentioned in *Co. Litt.* where a man grants one of the two horses in his stable. Or, in a case of election, as stated in Lord *Bacon's* Maxims of the Law, where a man grants ten acres of wood in a place where he hath a hundred acres. In 5 *Co. Rep.* 68 b. (a) it is said, "if a man has two sons, both baptized by the name of *John*, and con-

(a) *Cheyney's* case.

ceiving that the elder (who had been long absent) is dead, devises his land, by his will in writing, to his son *John* generally, and in truth the elder is living, in this case the younger son may, in pleading or in evidence, allege the devise to him, and if it be denied he may produce witnesses to prove his father's intent, that he thought the other to be dead; and it is afterwards said, "if no direct proof can be made of his intent, then the devise is void for the uncertainty." In *Mohun v. Mohun* (a) the testator had intended to devise something to his family, but it was not possible to say what he intended to devise, and the will was held to be void for uncertainty. In this case it being impossible to say which close the testator intended to devise, the devise is void for uncertainty, and the heir-at-law is entitled.

1893.  
  
 RICHARDSON  
 &  
 WATSON.

PARKE, J.—I am of opinion that the plaintiff is entitled to recover, and it is with some regret that I come to this conclusion, because upon the evidence it appears to me that the testator intended something to pass to the devisee; but at the same time I should be still more sorry to break through the rules of law. The lessor of the plaintiff is entitled to the property as heir-at-law, if nothing passes by the will. When the testator makes use of the word "close" he evidently uses the word in its popular and ordinary sense, because in other parts of his will he uses the word "closes." I cannot say upon the evidence offered which of the closes was intended to be devised. Evidence as to the meaning of the word close in the will would have been admissible. Where there is a devise to *A.* and there are two persons of that name, evidence is admissible to shew which was intended, according to the rule laid down in *Miller v. Travers*; but the question is, what meaning can be put upon the words used by the testator in his will, as the statute of frauds and the statute of wills both require the will to be in writing? In the former will offered in evi-

(a) Swanst. 901.

1833.

RICHARDSON  
v.  
WATSON.

dence there is precisely the same clause as in this, raising the same difficulty. Supposing this former will to be admissible in evidence, it does not shew that the testator meant to devise one close. The other evidence merely shews that the testator was mistaken in thinking that he was only possessed of one close in the occupation of *Watson*. It does not take away the doubt as to which close was intended to be devised. It is said that the devisee here has an election. It is quite clear that a right to elect only arises where the intention to give an election appears upon the face of the instrument. Thus, in the instance in *Bacon's Maxims*, which has been already alluded to, where a man grants ten acres of wood in Sale, and he has 100 acres of wood there, or where a lessor, seised of the manor of South S. and North S. leases *unum manerium de S.*, or being seised of two tenements in St. Dunstan's, leases one. Looking at this will it does not appear that one of two closes is intended to be given, and therefore in this case there is no election.

Postea to the plaintiff (a).

(a) See *Doe v. Martin and Richards, ante.*

#### The KING v. The Inhabitants of LONGNOR.

A deed is well executed by an illiterate person, if it be signed by a third person at his request and in his presence.

It is not necessary that the deed should have been previously read over to him, unless he had required it.

UPON an appeal against an order of removal, whereby *John Plant* was removed from Macclesfield, in the county of Chester, to Longnor, in the county of Stafford, the Court of Quarter Sessions confirmed the order, subject to the opinion of this Court on the following case:—

In April 1811 the pauper, then a minor, was desirous of being apprenticed to *Ralph Robinson*, a shoemaker living at Longnor, for whom he had worked from the preceding November. An indenture was accordingly prepared by an attorney residing at some distance, upon paper properly

1833.  
  
 The KING  
 v.  
 LONGNOR.

stamped, and their seals were affixed to the bottom of the paper, opposite to which the names of the master, the pauper, and his father were intended to be written. The indenture was fetched away by the pauper's father, and carried to the pauper at Longnor to be executed. Neither the pauper nor his father could write. They requested a person of the name of *Nadin* to write their names opposite to two of the seals at the bottom of the paper. This was done by *Nadin* in the presence of the pauper and his father. At this time the indenture was not read over, nor was any thing whatever said or done by *Nadin*, the pauper, or the father, except the signing by *Nadin*. The indenture was immediately taken by the pauper to his master and left with him, and the master then signed his name opposite to the third seal. There was no attesting witness to the execution by any of the parties. In a month or two after the signing of the indenture, it was taken by the pauper, at the desire of the master, to the attorney who had prepared it, to get the date altered, and it was then, for the first time, read over by the attorney to the pauper, and was approved by him. The alteration was not made, and the pauper carried the indenture back and gave it again to his master. The pauper served under the indenture nearly four years, residing in the appellant township. The pauper, who was called as a witness by the respondents, being asked by the Court with what intention or for what purpose he gave the indenture to his master, answered, "When I gave it to my master I considered myself then fast;" and afterwards stated, in answer to another question from the Court, that he considered himself bound from the time of the signing, and ever afterwards.

The question for the opinion of the Court is, whether the indenture was so executed as to enable the pauper to acquire a settlement by service under it.

*Lloyd*, in support of the order of sessions, was stopped by the Court.

1833.  
  
 The KING  
 v.  
 LONGHOR.

*Campbell, S. G. and Cottingham, contrd.*—There is no valid execution either by the father or the son. Not by the father, for he was ignorant of the contents of the instrument, and it was not read over to him. [*Denman, C. J.* Suppose he had been literate, and had not read over the instrument, would not his execution of it have been good?] It is stated in the case that neither the father nor the son could write his name. [*Parke, J.* He may still have been able to read. He signs it upon the credit of those by whom it is prepared.] It does not appear either that it was read to him, or that he read it. [*Parke, J.* According to the authority of *Thoroughgood's* case (*a*), the father's execution is valid. There it is laid down, that if a party is illiterate, he is not *bound* to execute the deed unless it be read to him; that he may call upon any person present to read it to him, and that if it be read falsely it is not binding; otherwise, if it be read fairly. Under the circumstances found by the case, the execution by the father may have been quite sufficient.] That which was done by the pauper and his father was by consent only. Being unable to write they should have executed as marksmen, *King v. Ripon* (*b*). The delivery is not sufficient. It was taken by the pauper to the master, which is not sufficient. [*Parke, J.* It was given by the father to deliver to the master. There can be no doubt as to the delivery.]

By the COURT.—There is no doubt that the execution by the father is sufficient, and we think that of the son is also good. The whole transaction is such as ordinarily takes place in the execution of such instruments. *Thoroughgood's* case is an express authority to shew that the execution is good.

Order of Sessions confirmed (*c*).

(*a*) 2 Co. Rep. 9.

(*b*) 9 East, 295.

(*c*) See *Shep. Touch. 56; Bennett v. Wade, 2 Atk. 327.*

In the matter of WILLIAM BATTINE, D. C. L.

1833.

In re  
BATTINE.

**DR. BATTINE** had been Advocate-General to the Admiralty, and upon his being superseded in his office he presented a petition to the Prince Regent, praying some provision upon retirement, in remuneration for his past services. This petition was referred to the Lords Commissioners of the Admiralty, who recommended his Royal Highness to grant a pension to the amount of 200*l.* per annum, in consideration of his ill health, and the length of time he had been in the office. The Prince Regent, on the behalf of his Majesty, and with the advice of the Privy Council, accordingly ordered that a pension of 200*l.* a year should be granted to him, the same pension to commence from the day on which he ceased to hold his office, and to be placed to the ordinary estimates of his Majesty's navy; and the Lords Commissioners of the Admiralty were to give further directions therein. The order by which the pension was granted was dated "At the Court of Carlton Palace, the 8th of May, 1812." In September, 1831, Dr. Battine applied to take the benefit of the Insolvent Debtors' Act, (7 Geo. 4, c. 57.) On the 17th November he was discharged, and the chief commissioner made an order that 180*l.* per annum should be paid to the assignees out of the pension of 200*l.* This order was communicated to the Lords Commissioners of the Admiralty, who consented thereto, and have since refused to pay to Dr. Battine any part of the sum of 180*l.*

In Michaelmas term last *Follett* obtained a rule, calling upon the commissioners, upon notice given to their chief clerk, to shew cause why a writ of prohibition should not issue against them to prohibit them from proceeding on their order of 17th November, 1831, for the assignment of a portion of a certain pension granted to *William Battine* by his Royal Highness the Prince Regent in council, acting in the name and behalf of his late Majesty King George 3,

Under 7 Geo. 4, c. 57, sect. 19, it is competent to the Insolvent Debtors' Court, with the consent of the Lords of the Admiralty, to order the payment to the assignee of a portion of a pension charged on the navy estimates, and granted to the insolvent by the Crown, upon his being superseded in the office of advocate to the Court of Admiralty, in consideration of ill health and length of time that he had been in the office.

1833.

In re  
BATTINE.

on the 8th May, 1812, and held during the pleasure of his Majesty (a).

(a) At the Court at Carlton House, the 8th of May, 1812, present His Royal Highness the Prince Regent, in Council.

Whereas there was this day read at the council board a report from a committee of the Lords of his Majesty's most Honourable Privy Council, dated the 6th inst., in the words following:—Your Royal Highness having been pleased by your order in council, of the 20th of March last, in the name and on the behalf of his Majesty, to refer unto this committee a report from the Right Honourable the Lords Commissioners of the Admiralty, dated the 28th of the preceding month, on the memorial of Dr. *William Battine*, late his Majesty's Advocate-General in his office of Admiralty, stating that he has been superseded in his office without being allowed an opportunity of vindicating himself from any imputation which may have been alleged against him, and praying some provision on retirement, in remuneration of his past services during the space of 20 years; in which report the said lords commissioners state that having established the facts of Dr. *B.*'s having for some years almost wholly discontinued his attendance in Court, and of his having from ill health, or the deranged state of his affairs, or both, become incapable of regularly performing the duties of his important office, they had felt it to be their duty to appoint another person to perform the duties of that situation, therefore they submit whether it may

be proper to grant Dr. *B.* a pension, in consideration of his ill health; the length of time he has been in the office; but recommend, in case your Royal Highness should be pleased to grant him a pension, that the amount thereof should not exceed 200*l.* per annum, the same being the amount of the salary paid the Admiralty advocate.

The lords of the committee, in obedience to your Royal Highness's said order of reference, having taken the said report into consideration, agree humbly to report their opinion to your Royal Highness that it may be advisable for your Royal Highness, under all the circumstances of the case, to grant to the said Dr. *William Battine*, in the name and on the behalf of his Majesty, a pension of 200*l.* per annum, the same to commence from the day he ceased to hold his office, to be charged on the ordinary estimates of the navy. His Royal Highness the Prince Regent, having taken the said report into consideration, was pleased, in the name and on the behalf of his Majesty, and by and with the advice of his Majesty's most Honourable Privy Council, to approve of what is therein proposed, and to order, as it is hereby ordered, that a pension of 200*l.* per annum be granted to the said Dr. *William Battine*, the same to commence from the day on which he ceased to hold his office, to be placed to the ordinary estimate of his Majesty's navy; and the Right Ho-

It was stated in the affidavits filed in answer to this rule, that Dr. *Battine*, in the first instance, when it was proposed to make an order for the payment of 180*l.* out of his pension, refused to take his discharge upon those terms, but after hesitating for a short time agreed to the order, signed the necessary paper, and was allowed to go at large.

1833.  
In re  
BATTINE.

*Campbell*, S. G., for the commissioners of the Insolvent Debtors' Court, now shewed cause. If the Court send a prohibition in this case they will constitute themselves a court of review for all the decisions of the Insolvent Court. There are many authorities to shew that this Court will not interfere with the decisions of a Court of Record. [*Parke*, J. That is where the Court has jurisdiction]. Supposing Dr. *Battine* had been subject to the bankrupt laws, and the Chancellor had made a similar order, this Court would not have interfered. Where an application was made for a prohibition against the Lord Chancellor, for having exceeded his jurisdiction in bankruptcy, the Court refused the application; *Ex parte Cowan* (a). [*Parke*, J. In that case the matter was within the jurisdiction of the Chancellor]. [*Littledale*, J. There are cases in Com. Dig. which shew that prohibitions may issue to the duchy courts and the courts of the counties palatine. This shews that the Court can send a prohibition to some Courts of Record.]

This is a matter within the jurisdiction of the Insolvent Debtors' Court. The Insolvent Debtors' Act (b) directs

nourable the Lords Commissioners of the Admiralty are to give the necessary directions therein accordingly.

(Signed) CHETWYND.

(a) 3 B. & A. 123.

(b) Sect. xi. "Such prisoner shall at the time of subscribing the said petition, duly execute a conveyance and assignment to the provisional assignee of the said Court,

in such form as is to this act annexed, of all the estate, right, title, interest, and trust of such prisoner in and to all the real and personal estate and effects of such prisoner, both within this realm and abroad, except the wearing apparel, bedding, and other such necessities of such person and his or her family, and the working tools and implements of such prisoner, not ex-



1893.

In re  
BATTINE.

all the effects of the insolvent to be assigned for the benefit of his creditors. The 29th section (a) excepts certain pen-

ceeding in the whole the value of twenty pounds, and of all future estate, right, title, interest, and trust of such prisoner in or to any real and personal estate and effects within this realm or abroad, which such prisoner may purchase, or which may revert, descend, be devised or bequeathed, or come to him or her before he or she shall become entitled to his or her final discharge in pursuance of this act, according to the adjudication made in that behalf, or in case such prisoner shall obtain his or her discharge from custody without any adjudication being made in the matter of his or her petition, then before such prisoner shall be at large and out of custody, and of all debts due or growing due to such prisoner, or to be due to him or her before such discharge as aforesaid; which conveyance and assignment so executed as aforesaid, in form aforesaid, shall vest all the real and personal estate and effects of such prisoner, and all such future real and personal estates and effects as aforesaid of every nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignee."

(a) Sec. 29. "Provided always, that nothing in this act contained shall extend to entitle the assignee or assignees of the estate and effects of any such prisoner, being, or having been, an officer of the army or navy or an officer or clerk, or otherwise employed or engaged in the service of his majesty in the customs or excise, or any civil office or

other department whatsoever, or being or having been in the naval or military service of the East India Company, or an officer, or clerk, or otherwise employed or engaged in the service of the Court of Directors of the said company, or being otherwise in the enjoyment of any pension whatever under any department of his majesty's government, or from the said Court of Directors, to the pay, half-pay, salary, emoluments, or pension of any such prisoner for the purposes of this act; provided always nevertheless that it shall be lawful for the said Court to order such portion of the pay, half-pay, salary, emoluments, or pension of any such prisoner as, on communication from the said Court to the secretary at war, or the lords commissioners of the admiralty, or the commissioners of the customs or excise, or the chief officer of the department to which such prisoner may belong or have belonged, under which such pay, half-pay, salary, emoluments, or pension may be enjoyed by such prisoner or the said Court of Directors, he or they may respectively under his or their hands, or under the hands of his or their chief secretary or other chief officer for the time being, consent to in writing to be paid to such assignee or assignees in order that the same may be applied in payment of the debts of such prisoner; and such order and consent being lodged in the office of the paymaster of his majesty's forces, or

sions. It is surely therefore for the Insolvent Debtors' Court to determine what is within the meaning of the 29th section. Whether the construction put upon that section be right or wrong, it is a question for them to determine. This Court is not to be subjected to continual applications to rectify the mistakes of the Insolvent Debtors' Court.

1833.  
  
 IN 18  
 BATTINE.

*F. Pollock*, (with whom was *Hoggins*) on behalf of the assignees of *Dr. B.*, also shewed cause. It is stated in the affidavits that previously to making the order, *Dr. B.* voluntarily signed the instrument assigning the 180*l.* per annum, as he was not able to procure his discharge without it. It is now too late for *Dr. B.* to say that the Court had no right to interfere; *Dr. B.* was a party to the arrangement; it was made with his consent and approbation. He has by that arrangement procured his discharge, and now he comes to this Court to set aside one of the terms of the agreement to which he was a party. The Insolvent Debtors' Court has acted in the same way in which this Court frequently acts. It often happens that where a defendant is brought up for judgment this Court suggests an arrangement, and in consequence of that arrangement passes a nominal sentence. A Court of Record has a right so to mould its proceedings as to meet the justice of the case.

*Follett*, in support of the rule. By the 11th section of the Insolvent Debtors' Act, the prisoner is to make and assign over all his real and personal estate and effects. A pension granted by the crown is no part of the real or personal estate which the debtor has power to assign. By the terms of the warrant, this is a pension determinable at the salary, emoluments, or pension, as shall be specified in such order and consent, shall be paid to the said assignee or assignees, until the said Court shall make an order to the contrary."

of the treasurer of the navy, or of the secretary of the said Court of Directors, or of any other officer or person appointed to pay or paying any such pay, half-pay, salary, emoluments, or pension, such portion of the said pay, half-pay;

1833.

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In re
BATTINE.

will of the king, and therefore cannot be assigned at common law, *Flarty v. Odum* (a). There is also a statute restraining the alienation. The 29th section gives to the Court of Insolvent Debtors jurisdiction over all pensions there enumerated, upon application to the head of the department. This is not such a pension as that section contemplates, as it is not granted by any department. [*Parke, J.* Is not Dr. B. a person that has been employed in a civil office in the service of his majesty in a department of the state?] This is not the species of pension which is said to be held *under the department* of the Admiralty. It is a pension granted by the king in council and by the mere favour of the crown. There are certain pensions granted for services by the 50 Geo. 3, c. 117, 57 Geo. 3, c. 65, and several other acts. This is not a pension of that description. It was granted at the instance of Dr. B. himself, and is not, in the ordinary meaning of the terms, a pension for services. The 50 Geo. 3, c. 117, requires certain forms to be gone through before a pension is granted, which are not necessary where the pension is granted by the crown. The pensions mentioned in that statute are in the nature of pay, and the consent of three of the commissioners of the Treasury is necessary before such grants can be made. The pension granted to Dr. B. is not in the nature of pay; it is held at the mere will of the crown, and was granted as a personal favour.

It is said that Dr. B. has consented to the assignment of the pension. It is immaterial whether or not he has consented, for if the Insolvent Debtors' Court has no jurisdiction, there can be no power to bargain for jurisdiction, and to make the assent of the insolvent to the assignment the condition of his discharge.

It has been contended that the Court will not grant a prohibition, as it was within the jurisdiction of the Insolvent Debtors' Court. It is contended, that it is not within the jurisdiction of the Insolvent Debtors' Court, and that as that is an inferior Court though a Court of Record, if it has

(a) 3 T. R. 681.

exceeded its jurisdiction, this Court will grant a prohibition; and the question is, whether the Court below has exceeded its jurisdiction.

1833.


In re
BATTINE.

DENMAN, C. J.—It appears to me that this pension is one within the meaning of the 29th section of the Insolvent Debtors' Act, and that, therefore, this rule must be discharged. The 29th section was framed to meet the case of *Harty v. Odum*. By the 11th section the prisoner is to execute an assignment of all his estate, right, interest, and trust in and to all his real and personal estate and effects.

The 29th section excepts certain pensions. That section consists of two parts. First, it is said that nothing in the act contained shall entitle the assignee of any prisoner to the pension of any prisoner having been employed in the service of his majesty in any civil office or other department whatsoever, or any officer being in the enjoyment of any pension under any department of his majesty's government. Then the second part authorizes the Court to order such portion of the pension to be paid to the assignees as the chief officer of the department to which the prisoner may belong shall consent to in writing. Upon looking at the warrant for the pension in this case, it seems to me that Dr. B. had been engaged in a civil office under the department of the Admiralty, and that he was in enjoyment of the pension *under that department*, for the services he had performed. It is unnecessary to consider any of the pension acts which have been cited. They may impose very proper restrictions in many cases; but in the grant of the pension the department is named, and to the head of that department a communication was made in conformity with the act. It appears to me that, putting a reasonable construction upon the 29th clause, this pension is within its purview.

LITLEDAL, J.—I am also of opinion that this pension falls within the meaning of the 29th section. The words

1833.

In re
BATTINE.

of that section are, "any such prisoner being in the enjoyment of any pension whatever, under any department of his majesty's government." There is no doubt that Dr. *B.* is in the enjoyment of a pension; the only question is, whether he enjoys it under any department. The office of Advocate General to the Admiralty is a civil office, and I think it is a civil office in the naval department. It is not necessary that an individual in the naval department should actually be engaged in martial proceedings. There may be and are several civil offices in the army.

PARKE, J.—It is unnecessary to inquire whether this pension passes under the general assignment to the provisional assignee, if we think it falls within the purview of the 29th section. That section gives the Court of Insolvent Debtors power to order the payment of pensions enjoyed under any department of the government, with the consent of the chief officer of the department. There is no statement in that clause that the pension must be granted in pursuance of any act of parliament. It is quite clear that Dr. *B.* holds a pension, and I think under some department. The pension is to be paid out of the navy estimates; and this, I think, shews that he holds it under the department of the navy. If so, the pension is quite within the 29th section.

Rule discharged with costs.

The KING v. The Lord of the Manor of OUNDLE,
Ex parte PRUDAY.

A. for a valuable consideration paid by *B.*, surrenders a copyhold to such uses as *B.* shall appoint, and in default of appointment to *B.* in fee, *B.* appoints to *C.* *Semble*, that the lord is bound to admit *C.* without requiring the previous admission of *B.*

Northampton, to shew cause why a writ of mandamus should not issue, directed to him, commanding him to admit *John Pruday* to certain copyhold hereditaments held of the said manor, pursuant to the surrender and deed of appointment made thereof by *Thomas Dawson*, upon payment to the lord of the fine and fees due to him upon such admission. The affidavits filed when the rule nisi was obtained stated as follows:—

On the 15th of November, 1808, *Elizabeth Thorogood*, widow, customary tenant of the said manor, in consideration of 285*l.* paid by *Richard Bagsdell*, did out of Court by the rod, according to the custom of the said manor, surrender into the hands of the lord of the said manor, by the hands of two customary tenants of the said manor, a messuage situate, &c. to the use of the said *R. Bagsdell*, his heirs and assigns, for ever, at the will of the lord, according to the custom of the manor.

On the 16th of October, 1809, *R. Bagsdell* was admitted tenant of the premises in pursuance of the said surrender.

On the 21st of December, 1830, *R. Bagsdell*, in consideration of the sum of 510*l.* paid to him by *T. Dawson*, did out of Court by the rod, according to the custom of the said manor, surrender into the hands of the lord of the said manor, by the hands of two customary tenants of &c. the said premises, to such uses, upon such trusts, and to and for such ends, intents and purposes, and with, under, and subject to such powers, provisos, declarations and agreements as the said *T. Dawson* by any deed or deeds should direct or appoint; and in default of and until such direction or appointment, to the use and behoof of the said *T. Dawson*, his heirs and assigns for ever, at the will of the lord, according to the custom of the said manor.

On the 22d of December, 1830, by an indenture made between *T. Dawson*, of the one part, and *Thomas Pruday*, of the other part, in consideration of 380*l.* to the said *T. Dawson* paid by the said *J. Pruday*, he the said *T. Dawson*, in exercise of the said power, did direct and

1833.

 The King
 v.
 The Lord of
 the Manor of
 Oundle.

1833.

 The KING
 v.
 The Lord of
 the Manor of
 OUNDLE.

appoint that the said premises should thenceforth remain and be to the only proper use and behoof of the said *J. Pruday*, his heirs and assigns for ever, according to the custom of the said manor.

On the 20th October, 1831, the last-mentioned surrender and deed of appointment were presented to the homage, when the steward of the manor refused to allow the homage to present the said deed of appointment, and refused to admit the said *J. Pruday* to the said premises, and caused a proclamation to be made for the said *T. Dawson* to come into Court and to be admitted. Against this rule

Campbell, S. G. now shewed cause. A person who has a mere power need not be admitted, but it is an invariable rule, that a purchaser, or one who has a beneficial interest in the copyhold tenements, cannot transfer his interest without having been previously admitted. *Dawson* had a beneficial estate, and was entitled to be admitted, and if he had died, his heir might have been admitted, and no other person. If the Court decide that in this case *Pruday* is entitled to be admitted, *Dawson*, from whom he purchased not having been previously admitted, this mode of conveyance will universally be resorted to, as it will give a party the power of at any time doing that which would be tantamount to admitting himself. This point has never yet been decided. The case which has come nearest to it is *Holder v. Preston* (a). In that case, a copyholder, being seised in fee, surrendered his land in Court to the use of his will, and by his will directed that his executors should sell the copyhold premises, and apply the moneys as therein mentioned. The executors did sell the land, and by indenture of bargain and sale conveyed the same to a purchaser in fee; the lord of the manor refused to admit the purchaser, and called upon the executors to be admitted. The Court were of opinion that the lord of the manor ought to admit

(a) 2 Wilson, 400.

the purchaser to the lands in question. There the ground of the decision was, that the executors had no interest in the land, but a mere power or authority. There no other person but the purchaser could be admitted. But there is no case in which it was held that a person who had the legal estate conveyed to him need not be admitted. In the case of *The King v. Hendon (a)*, *Bonham*, who was possessed of the estates, covenanted to surrender to *Goodrich*. This covenant the homage had presented at the Court, but no surrender was ever made. *Goodrich* then assigned his interest to *Rankin*, and *Bonham* surrendered to *Rankin*, who claimed to be admitted. It was contended that *Goodrich* ought to have been previously admitted. The Court, however, compelled the lord to admit *Rankin*. In that case *Goodrich* could not have been admitted, because he had no estate in him. *Boddington v. Abernethy (b)* will probably be relied on by the other side. The question there was merely whether uses limited in execution of a power of appointment over copyhold lands were good. There was no question as to the lord's right to a fine or the necessity of admittance.

Platt, contra. The deed of surrender having been presented by the homage, and the lord having afterwards called upon *Dawson* to act as tenant, he must be considered as having accepted the surrender in the terms of the deed. Now the terms of the deed are, that *Dawson* shall appoint the estate, and in default of such appointment, it should remain to him in fee. The legal estate remained in the surrenderor; *Dawson* might either become the tenant or the appointor of the tenant, according to the terms of the surrender. After appointment, however, he could not elect to become tenant. It is said that the heir would have a right to be admitted if *Dawson* had died without appointing. That is true, but he would have had no estate until he was admitted. The case of *The King v. Hendon*

(a) 2 T. R. 484.

(b) 8 D. & R. 626; 5 B. & C. 776.

1833.

 The KING
 v.
 The Lord of
 the Manor of
 OUNDLE.

1883.

 The KING
 v.
 The Lord of
 the Manor of
 OUNDLE.

is in point. There the lord resisted the claim to be admitted, on the ground that two fines ought to be paid to him, the one from *Goodrich*, and the other from *Rankin*. But the Court said, "that they had frequently declared they would give no opinion respecting the lord's fine, on an application by a tenant for a mandamus to be admitted, because the lord has no right to the fine at all till admittance. All the lord has a right to require is to have a tenant, and here he had one during the whole time." If any fine was due to the lord, an action might be maintained for it. *Holder v. Preston* is very similar to the present. Nothing appears in the affidavits, or in the documents there set out, to shew any estate whatever in *Dawson*.

DENMAN, C. J.—This case seems to me to be within the authorities which have been quoted, and which are collected in the second volume of *Watkins* on Copyholds. The surrenderee might, if he chose, claim to be admitted. If on the other hand he chose to execute the power of appointment, I think the appointee became tenant. I do not give this as my final opinion, but merely as my present impression. I think there should be a return.

LITLEDALE, J.—It seems to me that there is no objection to the admittance of *Pruday*. This will not at all prejudice the lord. The conveyance to *Dawson* must have been for some particular purpose, as the appointment of *Pruday* took place as early as the following day. I do not think the lord is entitled to a second admittance.

PARKE, J.—It seems to me at all events that this is a case in which there should be a return.

Rule absolute for a mandamus.



1835.

Ex parte CHARLES SANDYS.

JOHN WILLIAMS applied for a mandamus to the magistrates of the county of Kent, calling upon them to shew cause why they should not restore *Charles Sandys* to the office of magistrates' clerk. The applicant having been for many years clerk to the magistrates, has been by them dismissed from the situation without any reason being assigned for such dismissal. The clerk of the magistrates is an officer that has been recognized by public acts of parliament; in the act relating to the returns of jurymen(a), and in 9 *Geo. 4*, c. 61, s. 15(b). The magistrates cannot dismiss their clerk at their mere caprice or whim, as if he were an ordinary servant. They should at least have assigned some reason for dismissing a clerk who had been so long in their service that he might have had an opportunity of shewing them that they were labouring under a mistake, if such were the case. They at least have a public trust to perform in the election of their clerk.

A magistrates' clerk has no permanent interest in his office, and if he be dismissed without cause no mandamus lies to restore him.

By the COURT.—We can grant no rule in this case. The clerk to the justices has no interest in his office. It is merely an office at the pleasure of the magistrates, and resembles that of a vestry clerk.

Rule refused.

(a) 6 *Geo. 4*, c. 50, *semble* sec. 10, where it is required that notice of the special petty sessions to be held in September in every year, by the justices of the peace in every division in England, shall be given by *their clerk*.

(b) Where the clerk of the justices is authorized to demand and receive certain fees from every person to whom a licence to sell excisable liquors is granted by the justices.

1833.

The KING v. BENJAMIN FLOUNDERS, Esq. and others,
Justices of the North Riding of the County of York.

A notice to a magistrate of intention to move for a rule nisi for a certiorari, on the day on which the notice is served, "or as soon afterwards as I can be heard," will not be taken to be a notice of an intention to move as soon as by law the party might be heard, i. e. in six days after notice.

S. TEMPLE, in last Hilary term, had obtained a rule calling upon the justices of the North Riding of the County of York to shew cause why a certiorari should not issue to remove a certain order of allowance made and signed by **Benjamin Flounders, Esq.** allowing the accounts of **George Redhead** and **John Goldeborough**, the then surveyors of the highways, in the township of Kirklington, in the said Riding, and all proceeding relative thereto, and also a bill referred to in the said accounts. On the 11th of January, 1833, Mr. **Flounders** was served with the following notice: "I do hereby give you notice that I shall on the first day of next Hilary term, or as soon afterwards as I can be heard, move his majesty's Court of King's Bench, for a rule calling upon you to shew cause why a writ of certiorari should not issue, directed to you, and calling upon you to certify and remove into the said Court a certain order of allowance, &c. Dated this third day of January, 1833."

Thomas Bates,

F. Pollock and **Alexander** now shewed cause against the rule. Sufficient notice has not been given of the prosecutor's intention to move for the rule. The magistrates are entitled to have six days' notice to prepare themselves for shewing cause. The present notice is to be ready at any time after the notice was given. Here they were stopped by the Court.

Sir **James Scarlett** and **S. Temple** in support of the rule. The notice being for the first day of Hilary term, or as soon after as the party could be heard, will be construed by the Court as importing that it was the intention of the prosecutor to move *as soon after as by law he might*; *Doe v. Culliford* (a). Mr. **Flounders** was bound to understand that the

prosecutor did not intend to move before he was by law entitled to do so. Besides which, the service of the rule to shew cause is, of itself, sufficient notice.

1833.
The KING
v.
FLOUNDERS.

By the COURT.—Magistrates are entitled to six days' notice of the intention to move. But consistently with the terms of *this* notice the prosecutor might have moved on the following day. The service of the rule to shew cause is certainly not a sufficient notice.

Rule discharged (a).

(a) *Rex v. The Justices of Glamorganshire*, 5 T. R. 279; *Rex v. Nickolls*, ib. 281.

Ex parte RIGBY.

R. V. RICHARDS applied to the Court to re-admit an attorney, who, in his affidavit, stated that he had taken out his certificate for many years, and had been in the habit of employing his clerk to do so, but that in the last year, through an error of the clerk, no certificate had been taken out. He further stated, that he had continued to practice until after the expiration of the time for which the certificate was granted; but had not, until very lately, been aware of the omission; upon discovering which the present application was made. The cases of *In re James Winter* (b), and *Ex parte Leacroft* (c), were cited as authorities for granting the rule applied for, and were read to the Court.

The Court will, upon payment of a moderate fine, re-admit an attorney, who has inadvertently practised without a certificate, through the omission of a clerk usually employed to take it out.

DENMAN, C. J.—We will grant a rule in this case upon payment of a moderate fine.

Rule granted upon payment of 40s.

(b) MSS.

(c) 4 Barn. & Alders. 90.

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1833.

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In re  
BATTINE.

will of the king, and therefore cannot be assigned at common law, *Flarty v. Odium* (a). There is also a statute restraining the alienation. The 29th section gives to the Court of Insolvent Debtors jurisdiction over all pensions there enumerated, upon application to the head of the department. This is not such a pension as that section contemplates, as it is not granted by any department. [*Parke, J.* Is not *Dr. B.* a person that has been employed in a civil office in the service of his majesty in a department of the state?] This is not the species of pension which is said to be held *under the department* of the Admiralty. It is a pension granted by the king in council and by the mere favour of the crown. There are certain pensions granted for services by the 50 *Geo. 3, c. 117*, 57 *Geo. 3, c. 65*, and several other acts. This is not a pension of that description. It was granted at the instance of *Dr. B.* himself, and is not, in the ordinary meaning of the terms, a pension for services. The 50 *Geo. 3, c. 117*, requires certain forms to be gone through before a pension is granted, which are not necessary where the pension is granted by the crown. The pensions mentioned in that statute are in the nature of pay, and the consent of three of the commissioners of the Treasury is necessary before such grants can be made. The pension granted to *Dr. B.* is not in the nature of pay; it is held at the mere will of the crown, and was granted as a personal favour.

It is said that *Dr. B.* has consented to the assignment of the pension. It is immaterial whether or not he has consented, for if the Insolvent Debtors' Court has no jurisdiction, there can be no power to bargain for jurisdiction, and to make the assent of the insolvent to the assignment the condition of his discharge.

It has been contended that the Court will not grant a prohibition, as it was within the jurisdiction of the Insolvent Debtors' Court. It is contended, that it is not within the jurisdiction of the Insolvent Debtors' Court, and that as that is an inferior Court though a Court of Record, if it has

(a) 3 T. R. 681.

exceeded its jurisdiction, this Court will grant a prohibition; and the question is, whether the Court below has exceeded its jurisdiction.

1833.

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In re
BATTINE.

DENMAN, C. J.—It appears to me that this pension is one within the meaning of the 29th section of the Insolvent Debtors' Act, and that, therefore, this rule must be discharged. The 29th section was framed to meet the case of *Harty v. Odium*. By the 11th section the prisoner is to execute an assignment of all his estate, right, interest, and trust in and to all his real and personal estate and effects.

The 29th section excepts certain pensions. That section consists of two parts. First, it is said that nothing in the act contained shall entitle the assignee of any prisoner to the pension of any prisoner having been employed in the service of his majesty in any civil office or other department whatsoever, or any officer being in the enjoyment of any pension under any department of his majesty's government. Then the second part authorizes the Court to order such portion of the pension to be paid to the assignees as the chief officer of the department to which the prisoner may belong shall consent to in writing. Upon looking at the warrant for the pension in this case, it seems to me that Dr. B. had been engaged in a civil office under the department of the Admiralty, and that he was in enjoyment of the pension *under that department*, for the services he had performed. It is unnecessary to consider any of the pension acts which have been cited. They may impose very proper restrictions in many cases; but in the grant of the pension the department is named, and to the head of that department a communication was made in conformity with the act. It appears to me that, putting a reasonable construction upon the 29th clause, this pension is within its purview.

LITTLEDALE, J.—I am also of opinion that this pension falls within the meaning of the 29th section. The words

1833.

In re
BATTINE.

of that section are, "any such prisoner being in the enjoyment of any pension whatever, under any department of his majesty's government." There is no doubt that Dr. B. is in the enjoyment of a pension; the only question is, whether he enjoys it under any department. The office of Advocate General to the Admiralty is a civil office, and I think it is a civil office in the naval department. It is not necessary that an individual in the naval department should actually be engaged in martial proceedings. There may be and are several civil offices in the army.

PARKE, J.—It is unnecessary to inquire whether this pension passes under the general assignment to the provisional assignee, if we think it falls within the purview of the 29th section. That section gives the Court of Insolvent Debtors power to order the payment of pensions enjoyed under any department of the government, with the consent of the chief officer of the department. There is no statement in that clause that the pension must be granted in pursuance of any act of parliament. It is quite clear that Dr. B. holds a pension, and I think under some department. The pension is to be paid out of the navy estimates; and this, I think, shews that he holds it under the department of the navy. If so, the pension is quite within the 29th section.

Rule discharged with costs.

The KING v. The Lord of the Manor of OUNDLE,
Ex parte PRUDAY.

IN Hilary term last *Platt* had obtained a rule calling upon the lord of the manor of Oundle, in the county of A. for a valuable consideration paid by *B.*, surrenders a copyhold to such uses as *B.* shall appoint, and in default of appointment to *B.* in fee, *B.* appoints to *C.* *Scamle*, that the lord is bound to admit *C.* without requiring the previous admission of *B.*

Northampton, to shew cause why a writ of mandamus should not issue, directed to him, commanding him to admit *John Pruday* to certain copyhold hereditaments held of the said manor, pursuant to the surrender and deed of appointment made thereof by *Thomas Dawson*, upon payment to the lord of the fine and fees due to him upon such admission. The affidavits filed when the rule nisi was obtained stated as follows:—

On the 15th of November, 1808, *Elizabeth Thorogood*, widow, customary tenant of the said manor, in consideration of 285*l.* paid by *Richard Bagsdell*, did out of Court by the rod, according to the custom of the said manor, surrender into the hands of the lord of the said manor, by the hands of two customary tenants of the said manor, a messuage situate, &c. to the use of the said *R. Bagsdell*, his heirs and assigns, for ever, at the will of the lord, according to the custom of the manor.

On the 16th of October, 1809, *R. Bagsdell* was admitted tenant of the premises in pursuance of the said surrender.

On the 21st of December, 1830, *R. Bagsdell*, in consideration of the sum of 510*l.* paid to him by *T. Dawson*, did out of Court by the rod, according to the custom of the said manor, surrender into the hands of the lord of the said manor, by the hands of two customary tenants of &c. the said premises, to such uses, upon such trusts, and to and for such ends, intents and purposes, and with, under, and subject to such powers, provisoes, declarations and agreements as the said *T. Dawson* by any deed or deeds should direct or appoint; and in default of and until such direction or appointment, to the use and behoof of the said *T. Dawson*, his heirs and assigns for ever, at the will of the lord, according to the custom of the said manor.

On the 22d of December, 1830, by an indenture made between *T. Dawson*, of the one part, and *Thomas Pruday*, of the other part, in consideration of 380*l.* to the said *T. Dawson* paid by the said *J. Pruday*, he the said *T. Dawson*, in exercise of the said power, did direct and

1833.

The King
v.
The Lord of
the Manor of
Oundle.

1832.

 SIMS
 v.
 BRITTEN and
 HAYES.

defendants to his order only; and the case is just the same as if the defendants had been *Gribble's* bankers, and by his direction, and for his convenience, had kept a separate account of one part of his funds. If the other part-owners had been unwilling to trust *Gribble* alone with the money, they should have raised a separate account in their own names, or as owners of this ship, with the defendants; in which case the defendants would have been responsible to them. Not having done this, they cannot treat the defendants as their debtors. The defendants were debtors to *Gribble*, and are now responsible to his executors. There must therefore be no rule.

Rule refused (a).

(a) And see *Sims v. Bond*, post, vol. ii. 608.

The Duke of NEWCASTLE v. The Inhabitants of the Hundred of BROXTOWE.

Upon a question of boundary, ancient orders of sessions containing statements respecting the extent of a district within the jurisdiction of the Court of Quarter Sessions, made when no dispute as to the boundary appears to have existed, are admissible in evidence.

ACTION on 7 & 8 *Geo. 4*, c. 31, to recover compensation in damages for the felonious demolition, in part, of Nottingham Castle, by persons unlawfully, riotously, and tumultuously assembled, on the 10th October, 1831.

Plea: the general issue, not guilty.

At the trial before *Vaughan*, B., at the Leicester summer

The mention in Domesday Book of the town of A. previously to the enumeration of the hundreds in the county,—inquisitions taken by jurors of the town of A. upon deaths in the Castle of A.,—and a charter erecting the town of A. into a county of itself, with a special exception of the Castle of A.,—do not necessarily lead to the conclusion that the Castle of A. is not within one of the hundreds in the county; and a judge is authorized to direct a jury to give great weight to evidence of reputation tending to negative such a conclusion.

To entitle a party to a new trial on the ground of misdirection, it must be shewn that the jury has been thereby induced to form a wrong conclusion.

Held, that the owner of a house feloniously demolished by rioters, is entitled to such a sum, as compensation under 7 & 8 *Geo. 4*, c. 31, as will enable him to repair the injury and reinstate the premises,—without regard to collateral circumstances rendering the property of little or no value.

assizes, 1832.(a), the riot, the demolition of the Castle by the rioters, and the compliance by the plaintiff with the requisitions of 7 & 8 Geo. 4, were proved. Two disputed questions then arose: first, whether Nottingham Castle was within the hundred; and, if so, secondly, on what principle the compensation was to be computed.

1832.

 Duke of
 NEWCASTLE
 v.
 The Hundred
 of BROXTOWE.

Upon the first point the following documents were given in evidence on the part of the plaintiff:—

3d August, 1611.—By letters patent of this date, *James I* granted to *E. Ferrers* and *F. Phelps*, the Dove-house Close, the Brewhouse, and the site, ground, and foundation of the Castle Mills, “heretofore being part of the possessions of the Castle of Nottingham.”

18th February, 1622-3.—By letters patent of this date, the same king granted to *Francis Earl of Rutland*, the Castle of Nottingham, and the site, circuit, ambit, and precinct thereof; and the close called Dove-cott Close, in Nottingham Park; and a meadow called King’s Meadow, lying in or near the liberties or precincts of the town of Nottingham; a meadow lying on the south and west sides of the castle; a pasture called the Cow Close; a parcel of marsh land called Hele Close, a close abutting upon the said marsh land, and a close called Roach Close—all which were described as parcel of the lands, possessions, and revenues belonging to the king, in right of his crown of England.

The plaintiff then put in a series of documents, among which were the following:—

1274.—An extract from the Hundred Rolls, taken by special commission. One of the articles of inquiry was “of purprestures made upon the king, and by whom made;” and under the head of “Wapentake of Brokoltowe” was the following finding: “Also they say, that the Lord *Henry (III.)*, father of the king (*Edward I.*), made a certain weir across the river Trent, which has laid the

(a) Counsel for the plaintiff, Sir *James Scarlett* (specially retained), *Fynes Clinton*, and *G. T. White*; for the defendant, *Wilde*, Serjt. (specially retained), *Goulburn*, Serjt., *Balguy*, and *Waddington*.

1837.


 Duke of
 NEWCASTLE
 The Hundred
 of BROXTOWE.

King's Meadow, under the Castle of Nottingham under water, as also the meadow of the Brier of Lenton.

3 Edw. 3.—Extracts from the Roll of Pleas of the Crown, before Justices in Eyre, in the county of Nottingham.

"The Wapentake of Brocklestowe comes by twelve, &c."

"Robert de Landeford, of Nottingham, slew William Scott of Lenton, with a knife, at Nottingham, in the year abovesaid, who being conveyed to Lenton, and having been confessed, died there; and the said Robert fled immediately after the fact, and is suspected guilty; therefore he is proclaimed and outlawed: he had no chattels, nor was he in frankpledge; but he was one of the family (de familiâ (a)) of Richard Ballard, who is dead."

"William, the son of Ralph the blacksmith of Arnale, was wounded in the night-time, in Nottingham Field, by malefactors unknown, in consequence whereof, on the third day, having been confessed, he died. It is not known who they were, nor whence they came."

1699 and 1744.—The laid-tax assessments (under 4 W. & M. c. 1.) and office-copies of duplicates of said assessments in these two years, in which the Castle and Brew-house Yard are included as parts of *Broxtowe Hundred*.

3d April, 2d October, 1654, and 7th January, 1654-5; 14th April, 1655, and January, 1660.—Entries in a book of orders made at the quarter-sessions, wherein it is stated, that the castle and brewhouse were in the *Hundred of Broxtowe* (b). A question being raised whether these

(a) "FAMILIA. Hâc voce indigentantur servi, coloni, in prædiis rusticis commanentes, dominis prædiorum famulatum et servitium exhibentes."—*Ducange, in verbo*.

(b) Nottingham Sessions, holden the 3d of April, 1654.

Ordered, that the weekly payments to the poor people, under the Castle of Nottingham, be con-

tinued until the next meeting of justices for *Broxtowe Hundred*, at Papplewick, on Monday the 17th instant; and that the lords, owners and inhabitants of the Castle and place near thereunto, called the Brewhouses, (now appearing to be a parish and liberty of themselves, and not within the town and county of Nottingham, but within the wapentake of Broxtowe, and as-

1832.

Duke of
NEWCASTLE
v.
The Hundred
of BROXTOWE.

orders could be ready, either as judgments of the court of quarter-sessions, or as evidence of reputation; the learned

assessed therewith, and by law chargeable to the relief of their own poor,) have notice to appear at Burylawick, to shew cause why they should not be charged to maintain their said poor; or otherwise, and justices then present are desired, if they see cause, to stay any further payment by the treasurer of the county to these poor people, and to order them to be maintained by their said parish or libertie.

Nottingham Sessions, the 7th of January, 1654 (1654-5).

Whereas by a former order, of this Court, at Michaelmas Sessions, 1654, it was ordered that *Margaret Seywood* and *Robert Chapman*, two poor and impotent people, living in the Brewhouses under Nottingham Castle, being

Nottingham Sessions, the 2d of October, 1654.

Forasmuch as *Margaret Seywood*, widow, and *Robert Chapman*, living in the Brewhouse Yard, under Nottingham Castle, have formerly had and received, by order of this Court, several weekly pensions towards their relief and maintenance, paid them by the treasurer of this county out of the publick stock, in regard the said place of their habitation was not known to be of any particular parish: Notwithstanding, in regard the said place is now known to be within the wapentake of Broxtowe, and therewith assessed in all common charges; therefore this Court doth order, that from henceforth the treasurer shall forbear to pay any such further weekly pensions to the said poor people, and the same pensions shall be from henceforth allowed and paid to the said poor people by the chief constables of the wapentake of Broxtowe, out of a general levy to be made throughout the said wapentake for that purpose; where-

pay in the same to them accordingly.

not of any known particular parish, but being within the wapentake of Broxtowe, should have several weekly collections paid to them by the chief constables, out of the whole, towards their maintenance; to wit, the said poor widow, 2s. weekly; and the said *Robert Chapman*, — s. weekly; which charge being thence, by virtue of the said order, equally apportioned upon the particular townships in the said hundred, yet divers of the inhabitants and constables do REFUSE or neglect to pay their proportionable parts thereof, to the great hindrance of the said poor people; whereof they have greatly complained to this Court. Therefore this Court doth order, that the chief constables of the said wapentake shall forthwith levy all such sums of money as are in arrear, to the said poor people upon the said former order, upon all and every the inhabitants and persons assessed, by distress and sale of their respective goods and chattels, rendering to every of them the over-

1832.


 Duke of
 NEWCASTLE
 v.
 The Hundred
 of BROXTOWE.

judge held that they were admissible, and allowed them to be read.

1696—1815.—Returns of constables for the hundred of Broxtowe were read. Amongst these was the constable of Brewhouse Yard; and it was shown by the Roll that Brewhouse Yard and Standard Hill (a) were included in the hundred, in the county rate, and in orders of session

plus, if any shall be, and to cause the same to be speedily paid to the said poor people, that they be not starved for want of present maintenance. And this shall be a sufficient warrant in that behalf.

Nottingham Sessions, the 14th of April, 1655.

It is ordered by this Court, that the treasurer for the county stock do, upon sight hereof, allow and pay the sum of 6d. a week unto Robert Chapman, of the Brewhouse Yard, under the Castle of Nottingham, *more than his former pension*, for his better relief and maintenance.

Nottingham Sessions, January, 12 Car. 2, (1660-1.)

Forasmuch as it appears to this Court, by the examination of Ann Rivett, of Eastwood, in this county, spinster, taken upon oath before divers justices of the peace of this county, that the said Ann Rivett, on the 14th of November last, about three of the clock in the afternoon, was robbed as she was travelling on the king's highway, between Lenton and Nottingham, in Nottingham Park, being within the hundred of Broxtowe, and had the sum of 8l. 7s. feloniously taken from her, by a man unknown to her, who escaped away after the said fact, and hath not been apprehended by the in-

habitants of the said hundred; by default whereof the said inhabitants, by law, are liable to answer for the said robbery done, and damages, by way of action at the common law; for preventing whereof, and to avoid charges of suit in that behalf, which, as this Court conceives, cannot be defended—it is ordered by this Court, by and with consent of some justices of the peace, and other gentlemen and freeholders, some whereof were of the grand jury, serving this day in open court, that the said sum of 8l. 7s. be repaid to the said Ann Rivett, by the inhabitants of the whole hundred of Broxtowe aforesaid; and that in order thereunto, the chief constables of the said hundred do equally and proportionably tax every constabulary within the same particularly, towards the raising thereof, and send out their warrants to all the petty constables to tax and assess the same upon every inhabitant, and forthwith to collect and pay the same moneys into the hands of the said chief constables, who are hereby ordered and required to pay over the same unto the said Ann Rivett accordingly, taking a sufficient discharge under her hand for the same.

(a) As to which see *Rex v. The Inhabitants of Standard Hill*, 4 Maule & Selw. 378.

made for payments of sums as compensation for injuries done, pursuant to 9 Geo. 1, c. 22, and 7 & 8 Geo. 4, c. 31.

On the part of the defendants, it was insisted and strongly urged, that, except in the orders of sessions, no direct charge had been made on the hundred in respect of the castle or its precincts. Evidence was also given that the town of Nottingham was an ancient royal borough, and had from the earliest period been always free from any connection with the adjoining hundreds. An extract from Domesday Book was produced, in which the town of Nottingham is mentioned previously to the description of the hundreds in the county, the castle not being noticed. It was also shewn that there had been distinct juries for, and distinct amercements upon the town and the several hundreds, during the reigns of Edward 1, Edward 3, and Henry 6; and presentments by the coroner's jury during those reigns, by the jurors of the town of Nottingham as to deaths at the castle, and at the King's Mill, which was within the precincts of the castle: and a variety of documents were put in, shewing that the crown had been possessed of the castle from the earliest period to the reign of Henry 6, from whence the improbability of such a spot being subjected to the jurisdiction of the hundred was sought to be inferred.

A charter of the 27th of Hen. 6 was produced, by which the town of Nottingham was declared to be a county of itself, apart from the county of Nottingham; but the castle was specially excepted (a).

(a) " And further, of Our &c. we have granted for Us, Our heirs and successors, to the said now burgesses of the said town, and their successors, burgesses of the said town for ever, that the same town of Nottingham, and the precincts thereof, as they extend themselves or are used, which are now situate and contained within the body of the county of Nottingham, shall, from the 15th day of the

month of September next coming, be separate, distinct, divided, and in all things wholly exempt from the same county for ever, as well by land as by water, Our castle of Nottingham and Our messuage called the Kingeshall, in which is Our gaol of Our counties of Nottingham and Derby, only excepted; And that the same town of Nottingham and the precincts thereof, as they extend themselves or are used, except be-

1882.
Duke of
NEWCASTLE
v.
The Hundred
of REXFORD.

1832.

Duke of
NEWCASTLE
v.
The Hundred
of BROXTOWS.

The castle, which is a comparatively modern edifice, built since the Restoration (a), had been for many years dismantled and let out in two distinct tenements. It stands in the immediate vicinity of seventeen steam-engines, and is surrounded with barracks, and with buildings of an inferior character, erected under long leases, in the park; to which park there is now no access from the castle except through a lane.

As to the damage which the plaintiff had sustained, the plaintiff called Mr. Robinson, who stated that the cost of restoring the castle would be 31,280*l*. The defendants called Mr. Henry Wood, of Nottingham; Mr. Nicholson, of Southwell; and Mr. William Cubitt, of London. Mr. Wood had made estimates of the damage on three principles; the first, taking the net rental, which was 170*l*. per annum, and which at thirty years' purchase would amount to 5130*l*. The next was made on the supposition that the castle was pulled down, the materials sold, and the space thrown open for building ground. The value of the materials he estimated at 508*l*. His third calculation proceeded on the principle of restoration, which he thought could be done for 15,386*l*. Mr. Nicholson concurred in this latter estimate. Mr. Cubitt stated, upon cross-examination, that he should estimate the price of restoration at 21,000*l*.

The learned baron directed the jury to find for the plaintiff, if they thought upon the evidence that the castle was locally situate within the hundred. His lordship observed, that the orders of sessions and the land-tax assessments, were entitled to great weight, as shewing that the castle had, for two centuries, been reputed to form part of the hundred; that when for a great length of time things have

fore *excepted*, shall be from the same day a county by itself, and not parcel of the said county of Nottingham; and that the same town of Nottingham, and the precincts thereof, as they extend themselves or are used, *except before*

excepted, shall be named, reputed and esteemed the county of the town of Nottingham by itself for ever."

(a) For its previous history, see "Memoirs of Colonel Hutchinson," by Lucy Hutchinson.

gone in a certain course, it is reasonable to infer that they had always done so, unless the evidence to the contrary were certain; and that the evidence which had been adduced on the part of the defendants did not appear to him to take the castle out of the hundred of Broxtowe. The question of damages he left generally to the jury, having read to them the whole evidence on that point, observing that in cases of this sort, exaggeration was ordinarily found on the one side, and detraction on the other, but that the duty of the jury was to avoid both.

1832.
Duke of
NEWCASTLE
The Hundred
of BROXTOWE.

Upon hearing this summing up, the counsel for the defendants tendered a bill of exceptions (a).

The jury returned a verdict for the plaintiff, damages £1,000. In Michaelmas term last,

Willie, Serjt. moved for a rule nisi for a new trial, on three grounds; first, the reception of improper evidence; secondly, misdirection; and thirdly, that the damages were estimated upon an erroneous principle.

First point:
Admissibility
of evidence.

The orders of sessions (b) should not have been received in evidence. They were not admissible as orders of the Court of Quarter Sessions, since the justices had no authority to make them. Nor were they evidence of reputation. It did not appear that the magistrates by whom they were made were resident in the county, or that they had any peculiar knowledge as to whether the castle and its precincts were within any particular division of the county, or that they possessed any peculiar means of knowledge. But the statements which are found in these orders, were clearly statements made post litem motam. Before the orders, it is evident that "the poor people under the castle of Nottingham" had been relieved by the county, on the footing

(a) The bill of exceptions was not formally drawn up at the trial, but notes were taken of the defendants' objections to the learned judge's summing up, and otherwise to his mode of dealing with the

case. The same objections were afterwards presented to the Court on the motion for a new trial, for the sake of which the bill of exceptions was abandoned.

(b) *Ante*, 600, 601, 602.


1833.

 Duke of
 Newcastle
 to
 The Hundred
 of Broxtowe.

of their place of residence or settlement being out of the hundred of Broxtowe. The object of these orders made by justices of the county was, to transfer the burthen from the county at large, i. e. from themselves, to the inhabitants of the hundred. With this view they speak of the place as "*now known to be within the wapentake of Broxtowe*," an expression not denoting the casual recognition of an undisputed fact, but an inference drawn from some evidence or statement laid before them, that evidence or statement appearing by what follows to be, that the place "*is therewith assessed in all common charges.*" We have the justices in the first two documents making orders in a matter in which they had no jurisdiction, upon persons whose liability is supposed to arise from the fact of this place being within the hundred—an inference which by the third document appears to have been resisted by the parties on whom the burthen was sought to be cast, and which by the fourth document is shewn to have been ultimately abandoned at the very next sessions by the county magistrates, when they direct an increased payment to be made out of the county stock to *Clapman*, who therefore, in spite of the former order, was deriving his subsistence, not from the hundred of Broxtowe, but from the county at large. To make such statements evidence would not be more reasonable than to attempt to prove a certain track to be a public highway by putting in orders to repair it, which had been disobeyed. The fifth document is of a very extraordinary character. It records the interference of the magistrates to prevent the bringing of an action by which a prejudice might have resulted to themselves, upon a statement of the party robbed, "*taken upon oath before divers justices of the peace of the county,*" from which they draw the conclusion that an action cannot be defended. Then, *upon consent of the freeholders*, they direct a payment to be made in respect of which the justices have no jurisdiction.

But supposing these orders to have been admissible on the footing of *reputation*, they were not so received; nor were

they so presented to the jury. Throughout the cause they were treated by the learned judge as being in the nature of *judicial decisions* upon the very point in issue. If these documents had been treated as mere evidence of reputation, they would have produced a very different impression upon the minds of the jury, and would have been met in a very different manner by the counsel for the defendants. But the learned baron told the jury that these orders were entitled to the fullest weight, as *showing the opinion of the magistrates* on the point (a); though at the same time, he said, he did not consider them as evidence of the fact that the money ordered to be paid had been paid. The documents produced by the plaintiff were pointedly brought to the notice of the jury. Great stress was laid upon the land-tax assessments, although, for the convenience of the collectors, many places are united to adjoining districts, for the purposes of collection, with which they are otherwise wholly unconnected; and not a word was said as to the documentary evidence of the defendants, otherwise than to remark that it did not shew the castle to be *taken out of the hundred*. A false aspect was thereby given to the evidence, and when the learned baron told the jury that when things had gone on in a certain cause for a long time, it was reasonable to presume that they had always done so, the jury were as effectively misled as if they had been expressly told that the plaintiff *had* shewn a long-continued user, untouched by any evidence on the part of the defendants. Throughout the trial the learned judge treated the case as if the question had been, whether the castle had ever been *taken out of the hundred*, assuming it

1882.

 Duke of
 NEWCASTLE
 2.
 The Hundred
 of BROXTOWE.

(a) Assuming that declarations made by the magistrates individually would have been evidence of reputation, it does not seem necessarily to follow that a document deriving its existence from the resolution of a *majority* of the magistrates who were present will

have that effect. Some or all of the magistrates acquainted with the hundred of Broxtowe *may* have dissented from these statements, and the orders *may* have been carried by a majority consisting wholly, or in part, of magistrates resident in the adjoining counties.

1893.

Duke of
NEWCASTLEv.
The Hundred
of BROXTOWE.Third point:
Principle on
which indem-
nification to
be calculated.

to have been once there; whereas the defendants insisted that the castle never did form part of the hundred.

The amount of rent presents a fair criterion of the value of a building which is shewn to be so situated as to be wholly unfit to be applied to any purpose except that of letting out (a); and the compensation to which the plaintiff was entitled was in this case a reasonable number of years' purchase of the rent actually obtained. The jury have estimated the damage upon a principle of *restoration*. If a nobleman has a house which he chooses to inhabit, or which from its antiquity, from its situation, or from collateral circumstances, possesses a value beyond the rent which could be obtained from a tenant, the principle is applicable; but the castle was never used as a family residence, nor was it capable of being so used. It was manifest by the acts of the duke with respect to the surrounding property that it never was intended to be so used,

Cur. adv. vult.

In the course of the same term, the judgment of the Court was delivered by

PARKE, J.—In this case, my brothers *Tauntton* and *Paterson*, and myself, before whom the motion for a new trial was made, (my Lord Chief Justice not having at that time taken his seat on the bench,) are of opinion that no rule should be granted.

First point.

The first objection was, that certain orders of sessions, in number five, and made in the years 1654, 1655 and 1661, were improperly received in evidence.

These documents were admitted, not as orders upon matters over which the magistrates had jurisdiction, but as evidence of reputation; and in that point of view we are of opinion that they were admissible. Four of them contain

(a) If a sale at 5081*l.*, the estimated value of the materials, had been proved, a question might have arisen whether the vendee, or even

the vendor, could have insisted upon the principle of *restoration* without modification.

an express statement, the fifth an implied one, that the Castle (or the Brewhouse, or the Park of Nottingham, which belong to it) is within the wapentake or hundred of Broxtowe. The statement is made by the justices of the peace assembled in sessions, who, though they were not proved to be residents within the county or hundred, must, from the nature of their offices alone, be presumed to have sufficient acquaintance with the subject to which these declarations relate; and the objection cannot prevail, that they were made after a controversy upon that subject had arisen; because there appears to have been no dispute upon the particular question, whether the Castle and its precincts were in the hundred of Broxtowe. These statements, therefore, fall within the established rule as to the admission of evidence of *reputation*.

The second objection was, that the learned judge did not present the question to the jury in the manner in which he ought to have presented it; not, that he misinstructed them in point of law, but that, in observing upon the facts, he ascribed too great weight to the evidence of modern usage and reputation, and particularly to the above-mentioned orders, and too little to the ancient documents produced on the part of the defendants. But we must receive with very great caution objections of this nature; for if we were to yield to them on all occasions in which we might disagree with some observations made on particular parts of the evidence, upon which it is the province of the jury to decide, we should seldom have any case which involved many facts brought to a termination. It is only in those cases in which we are satisfied that the jury has been led to a wrong conclusion that we ought to interfere; and we cannot possibly say that they have been induced to form a wrong conclusion in this. Without meaning to say that the learned judge was wrong in attaching great weight to these particular documents, we all agree that the general scope of his observations upon the evidence was perfectly correct. We understand him to have said, in substance,

1832.
Duke of
NEWCASTLE
v.
The Hundred
of BROXTOWE.
Presumption
of knowledge
by justices of
boundaries of
districts within
their jurisdiction.

Post litem
motam.

Second point.

Extent of mis-
direction.

1832.

 Duke of
 Newcastle
 v.
 The Hundred
 of Broxtowe.

that as by the usage and reputation for nearly two centuries, the Castle and its precincts have been considered as being within the hundred, it ought to be inferred that they were legally so, unless the ancient documents clearly and satisfactorily proved that they were not. This is only an example of the principle which is applicable to all rights of way and common, to tolls, to moduses, in short, to all prescriptive and ancient rights, customs, exemptions and obligations; in all which long usage should always be referred, if possible, to a legal origin; and it is only by the constant practical application of this principle that much valuable property, and many important rights and privileges, are preserved.

In adapting this principle to the present case, (there being strong and uniform evidence of modern usage from the middle of the seventeenth century,) the only question is, whether the older documents clearly shew that this usage is wrong, and that the Castle and its precincts *could not* have been within the hundred at the time of the first institution of that division? Now these documents prove, that from the time of Domesday there was a borough of Nottingham; that the borough in later periods had a jury distinct from that of the hundred; one of them, in 3 *Edw.* 3, tends to shew that the Castle was within the jurisdiction of that jury; and the charter of *Henry 6* may be considered as demonstrating, that at the time of the erection of the borough into a county of itself, the Castle did, for some purposes at least, form a part of the borough; for the borough is made a county, *with the exception of the Castle*. But admitting this, why may not the Castle, though in the borough for some purposes, have also been a part of the hundred; for as a borough may include a part of two counties, (the borough of Tamworth(a), for example,) why may it not comprise part of a hundred, or part of two or more hundreds? And may we not also reconcile the exclusion of

(a) So, the borough of *Bristol*, before Bristol was either a city or a county.

the Castle from the new county, on the supposition that it had originally belonged to the hundred? We do not think that any of these documents are so clearly inconsistent with the long usage and reputation in modern times as to prevent a jury from drawing the usual inference,—that what has existed so long has existed from the earliest period necessary for the purpose of giving it validity.

1838.
Duke of
NEWCASTLE
v.
The Hundred
of BROXTOWE.

The third objection was, that the damages are excessive. This is peculiarly for the consideration of a jury; and nothing has been said which induces us to think that the jury have in this case proceeded on an erroneous principle of calculation. Certainly if that principle had been pursued which was contended for by the learned counsel who moved for the rule, an erroneous principle would have been adopted; for the jury would have done wrong to consider whether the Castle was an ancient possession of the family of the plaintiff or not,—whether he was likely to reside there,—and whether the neighbourhood was suitable to such a residence. The true question is, what sum of money will repair the injury done by the mob? what will replace the house in the situation and state in which it was at the time of the outrage committed, as nearly as practicable? There seems every reason to believe that the jury have acted on this principle; and if so, they have done right. At any rate, it is impossible for us to say they have done wrong. Third point.

Rule refused (a).

(a) The bill of exceptions, which had been tendered at the trial, was waived by the defendants for the sake of this motion. Here therefore the matter terminated.

As to the *formal* proceedings

under this statute, (7 & 8 Geo. 4, c. 31,) see *Pellew v. Hundred of East Wotford*, 4 Mann. & Ryl. 130, 9 Barn. & Cressw. 134; *Rex v. Bateman and Hart*, Justices of Folkstone, *post*, 718.

1832.

The KING v. JOHN PATTESON, Esq. (a)

A statute directs the payment of county rates to a person to be appointed by the justices county-treasurer, *he first giving sufficient security to the justices to be accountable to them for the moneys which he shall so receive.* The giving of the security is not a condition precedent to the vesting of the office of treasurer in the person so appointed, or to his liability to account.

An office of which the salary is to be fixed, and the accounts audited by certain justices, cannot be held by one of such justices.

An alderman elected by the *whole* corporate body, does not vacate his office by the acceptance of an incompatible office conferred upon him by a *select* body.

Such second appointment is void, *semble*.

A public officer cannot vacate his office by accepting an incompatible office, unless the first office be one which he might have determined by his own act,—or which he might have surrendered to the party appointing to the second office,—or from which he might have been moved by, or with the concurrence of, such party.

INFORMATION in the nature of a *quo warranto*: first count, for usurping the office of alderman of the city of Norwich; second count, for usurping the office of justice of the peace of the said city; third count, for usurping both these offices,

The plea to the first count, after setting out a charter whereby *Charles II.* granted, among other things, that there should be aldermen of the said city, and that all the aldermen who had borne the office of mayoralty should be justices of the peace of the said city, averred that the defendant, in December, 1781, was duly elected and still is alderman. The pleas to the second and third counts further averred, that in June, 1798, the defendant was elected mayor, and served the said office during a year, and thereby became justice of the peace.

Replication to the first plea: that after the defendant had become alderman, to wit, in June, 1788, the defendant was elected and became mayor for one year, and thereby became a justice of the peace for the city; that in August, 1827, the defendant being such mayor and justice, was constituted treasurer of the city, giving security to account (b);

(a) Decided in Michaelmas term, 1832.

(b) By 12 *Geo. 2*, c. 29, s. 6, "the high constables shall, and they are thereby required, at or before the next general or quarter sessions respectively after they or any of them shall have received such sum or sums of money, to pay the same into the hands of such (the) person

or persons whom the said justices shall at their respective general or quarter sessions, or the greater part of them then and there assembled, appoint to be the treasurer or treasurers, (which treasurer or treasurers they are thereby authorised and empowered to nominate and appoint,) such treasurer or treasurers *first giving sufficient security*

that he gave the required security and took upon himself the office of treasurer, which offices of alderman and treasurer are wholly incompatible with each other, whereby the defendant vacated the office of alderman, and ceased to be an alderman of the said city.

Replication to the second plea: that in August, 1827, the said defendant was mayor and treasurer, as alleged in the plea, was appointed treasurer and gave security, and took on himself the office of treasurer; and that the offices of justice of the peace and treasurer are incompatible. The replication to the third plea differed from the replication to the second, by averring that the offices of alderman, justice of the peace, and treasurer, are incompatible.

The defendant rejoined, taking issue upon the allegation, in each replication, of the giving of security.

General (a) demurrer, and joinder.

Campbell, in support of the demurrer (b). The rejoinders are bad, inasmuch as they tender an issue clearly immaterial. The statute (c) does not make the giving of security a condition precedent to the vesting of the office of treasurer in the person appointed by the justices. It merely requires this to be done previously to the receiving of moneys from the high constables.

The replications are sufficient. They allege that the defendant has been appointed to and has accepted offices which are incompatible. The county treasurer is appointed

(in such sums as shall be approved of by the said justices, at their respective general or quarter sessions, or the greater part of them then and there assembled,) to be accountable for the several and respective sums of money which shall be respectively paid to them in pursuance of this act, and to pay such sum or sums of money as shall be ordered to be paid by the justices, in their general or quarter sessions, and for the due and faith-

ful execution of the trusts reposed in him or them, &c."

(a) The demurrer professed to be special; but the objections were such as would have been available under a general demurrer, and were stated too vaguely to satisfy the statute, supposing an assignment of special causes of demurrer to have been necessary.

(b) Argued in Michaelmas term, 1831.

(c) 12 Geo. 2, c. 29, s. 2.

1832.
The KING
v.
PATTERSON.

First point:
Insufficiency
of rejoinders.

Second point:
Sufficiency of
replications.

1832.

 The KING
 v.
 PATTERSON.

by the justices of the peace, and is removable at their pleasure. To them he must account for all moneys received (a), and by them the amount of his salary is to be fixed (b). These offices being incompatible, it follows that by acceptance of the second the first is vacated; *Milward v. Thatcher* (c), *Rex v. Pateman* (d), *Rex v. Tizzard* (e). A distinction will be taken between the case of two incompatible offices in a corporation, and two offices which are not corporate, or of which only one has that character; but it will be shown that in all cases of public offices, the acceptance of a second office, incompatible with one previously held, vacates such former office; and that in the cases in which both offices have been corporate, the Court has proceeded upon the general ground of incompatibility, as in *Milward v. Thatcher*, *Rex v. Blisset* (f), and *Rex v. Tizzard*. In *Verrior and Mayor of Sandwich* (g), a mandamus had issued to restore *Verrior* to the office of town clerk in the town of S., and the return alleged that *Verrior* had been elected to the office of mayor, which office he had accepted and served, and that he was afterwards elected and still continued one of the jurats; and that in the town of S. there is a court of record held before the mayor, which the town clerk ought to attend as a minister, and that the jurats are as justices of the peace there. Then it was argued that the offices were incompatible, for that the town clerk could not attend upon himself as judge of the court, nor fine himself for his own defaults as minister of the court; and that it was as inconsistent as if the Chief Justice of K. B. were prothonotary or clerk of the papers of his own Court, (which, the Chief Justice says, he cannot be,) or a judge of C. B. And it was said to have been also held, that a bishop could not hold a living in commendam in his own diocese, because he could not visit himself, or be both parson and

(a). 13 Geo. 2, c. 29, ss. 6, 7, 11.

(b) 55 Geo. 3, c. 51, s. 17.

(c) 2 T. R. 81.

(d) Ibid. 779.

(e) 4 Mann. & Ryd. 409; 9 Barn. & Creswell. 418.

(f) 1 Dougl. 398, note.

(g) 1 Siderf. 305; post, 622, 623.

ordinary: which argument seemed to the Court good, although they gave no ultimate opinion upon the point. There, it is evident, both from the argument and the analogies brought in support of it, that the opinion of the Court was not at all grounded on the fact of the two offices being corporate. In *Com. Dig. tit. Officer*, (K. 5,) it is said, "a man shall lose his office if he accept another office incompatible; as if the one office be under the controul of another;" and then two cases are cited, the first of which is of an office not corporate. And in (B. 6.) it is stated, that "the grant of an office to one who has another office incompatible, is not good; for the first office will thereby be void; as if a forester by a patent for life be made justice in eyre of the same forest, pro hac vice the office of forester will be void, for it is incompatible, being subject to correction by the justice in eyre;" or "if a justice in C. B. be made a justice of B. R." For this last proposition the authorities quoted are *Dyer*, 159, and *Cro. Car.* 127, 128, in which respective cases it was held, that *Dyer* and *Croke*, who being justices of C. B. were appointed justices of B. R., the patents of promotion vacated the former offices, and that no formal revocation was requisite. It is said in *F. N. B.* 163, "a coroner made sheriff is discharged of his office of coroner"(a), and this is adopted in *Com. Dig. tit. Officer*, (G. 4.) Other cases are quoted, some of them being of two corporate offices, and others of offices not connected with corporations; in all of which it is said that the inferior office is void upon the officer's being appointed to another office incompatible with the first. But it is said, under the same title, that the chief justice of C. B. being made keeper of the great seal, continues chief justice; and two cases are referred to in which those offices were held conjointly, by Sir *Orlando Bridgman*(b) and Sir *Edward Littleton*(c); and also that a justice of C. B. may be Chief Baron of the Exchequer, as was the case with Sir

1832.
The KING
v.
PATTESON.

(a) Cited *Com. Dig. tit. Officer*,
(B. 6.)

(b) 1 Siderf. 338.

(c) 1 *Cro. Car.* 600.

1832.

THE KING
v.

PATTESON.

Humphrey Starkey (a); for in all these cases the duties of the respective offices are not incompatible. In *Sir Charles Howard's* case (b), the judges agreed that the offices of keeper and bailiff of several walks, and of the game there, and of riding forester, were inferior to his place of verderor, and so determined by his acceptance thereof. Through all these cases the general principle clearly runs, and is fully established by them, that both as to offices corporate and offices of a public nature not corporate, the acceptance of a second office incompatible with one previously held, operates as an avoidance of the first. In such case is the defendant here.

First point.

Coleridge, contra. The rejoinder does not tender issue upon an immaterial point; because under the terms of the act of parliament, the office of county-treasurer does not vest fully in the person appointed until the security be given; it is a condition precedent to his being able to perform the duties of his office. One of the facts from which the Court might form their opinion that the two offices are incompatible, is the liability of one officer to account to others for moneys which the former receives in his office. Now the county-treasurer cannot receive moneys, and therefore cannot be liable to account, until he has given security. Here then, the fact alleged in the replication, as to the giving security, is a material fact, which it was sufficient for the defendant to traverse; for although there were also other distinct material facts, a traverse of one of them alone is good; *Com. Dig. Pleader*, (G. 10.) It does not affect the case that the plaintiff has alleged that the defendant had accepted the office and had entered upon the duties of the office, for until security given that office is not incompatible with those of alderman and justice of the peace.

Second point.

The replication is bad; for it states that the defendant, being an alderman and justice of the peace, was appointed to, and took upon himself, the office of treasurer, which offices were incompatible with each other; whereby the

(a) M. 1 H. 7, fo. 10 b, 11 a, pl. 13.

(b) Sir W. Jones, 205.

defendant *vacated* the offices of, and *ceased to be*, an alderman and justice of the peace of the city. The offices, it is admitted, are incompatible, but a man by being appointed to and accepting an office, *not corporate*, does not *thereby* vacate a corporate office, which at the time he held. In the case of an acceptance of a second corporate office, incompatible with a former corporate office, held by the same individual, the Courts have proceeded upon a presumption of a *surrender* of the one simultaneously with an acceptance of the other. This assumes that both offices had been granted by the same power; for a surrender by the grantee is not perfect until acceptance by the grantor; which acceptance is involved in the appointment *by such grantor* to the second office. The authorities undoubtedly establish that two incompatible offices cannot be held at the same time by the same person, but not that one becomes ipso facto void by his acceptance of the other. Thus a coroner, accepting the office of sheriff, may continue to be coroner until discharged by the king's writ. In *F. N. B.* 163, (upon the writ *de coronatore eligendo vel exonerando*,) it is said, "and the coroner shall be discharged of his office by the king's writ sent unto him, and thereupon shall issue another writ, directed unto the sheriff, to choose a new coroner, and that writ shall recite the cause of the discharge of the other coroner." One of the causes mentioned by this author, for which the king is to say in his writ "*We have removed him from that office*," is this, "for that he is chosen into the office of sheriff of the county aforesaid." Such writ might not perhaps have been necessary at that early period, when both sheriff and coroners were elected by the freeholders (a). At the times when the office of justice of C. B. was declared to be vacated by letters-patent appointing the same individual to be a justice of B. R., these incompatible offices were held *durante bene placito*, and therefore the king determined his will touching the first

1832.

The KING
v.
PATTESON.

(a) *Kide 3 Mann. & Ryl.* 493; 5th & 6th ed.); *Articuli super Madox, Exchequer*, 279t; *Ib.* 283l; *Chartas*, cap. 8. So conservators *Bac. Abri. Sheriff, A.* (vol. vi. 140, of the peace, 2 Inst. 558.

1832.
 The KING
 v.
 PATTERSON.

office by promoting to another office, the duties of which were incompatible with those of the former. But when the judges came to be appointed *quandiu se bene gesserint*, the case was altered. Sir John Walter, (who had been appointed Chief Baron of the Exchequer by patent, 1 Car. 1, *quandiu se bene gesserit*,) being in the king's displeasure, and commanded that he should forbear the exercising of his judicial place in court, never exercised his place in court from Michaelmas 5 Car. 1, to his death. And because he had that office *quandiu se bene gesserit*, he would not leave his place or surrender his patent without a *scire facias* to shew what cause there was to determine his patent or to forfeit it; so that he continued chief baron until the day of his death (a). If the king had possessed the power of divesting him of his office, by appointing him to an incompatible office, there can be little doubt that he would have availed himself of it. In the several passages referred to in *Com. Dig. tit. Officer*, the cases mentioned in which one office is said to be vacated by the acceptance of a second, are all cases in which both offices are granted by the same power, with only one exception. With regard to the cases of forester, steward, and justice in eyre of the forest, the two latter officers are appointed by the king, and the first is spoken of, by Lord Coke only, as holding his office by patent, but, by *Manwood*, as holding it either by patent in fee, or during the pleasure of the king. The dictum as to the case of a bishop holding a living in commendam within his own diocese, has been disputed by *Gibson* (b), for this reason, that the bishop may be visited by the archbishop. And *Doderidge, J.*, in the case of *Cole v. Glover* (c), appears to have entertained the same opinion. Besides, it must be observed, that the bishop's case is governed by a provision of the ecclesiastical law. So, the avoidance of one living by the acceptance of a second, is by virtue of the provisions of a particular statute, 21 Hen. 8, c. 13; and in cases not embraced by that statute, viz. livings under the annual value of 8*l.*, there is no

(a) Cro. Car. 403: (b) Codex, 913: (c) Sir Fra. Moore, 899.

avoidance, except at the will of the patron or by the sentence of the bishop. In *Sir Charles Howard's* case the question was, whether the offices claimed should be seized into the king's hands, and the judgment was, that there was good cause for seizing them. In the cases where one of two incompatible offices is vacated, the question arises, which of them must it be? *Rex v. Blisset* was decided on the ground that the acceptance of a superior office vacated an inferior, not that the second, as such, vacated the first. In the case of *Sir Charles Howard*, the ground upon which the Court decided was, that the offices claimed by him were inferior to that of vercleror. This being the state of the decisions upon this point, it is very questionable whether, if the defendant in this case has vacated one of his offices, he has not rather vacated that of county-treasurer than that of alderman.

1882.
The King
v.
Pattison.

In order to make an avoidance, the grantor and grantee must concur; for if the grantee refuse to accept the second office, the first office does not become vacant by the conferring of the second; *Borton's* case, cited in *Audley's* case (a). The concurrence of the grantor and grantee may be construed to be an assent to the avoidance of the first office; but in all cases an amotion is requisite, express or implied. In *Rex v. Heazen*, where the defendant (b), being an alderman of Bedford, had been absent from Bedford thirteen years, and had lately been appointed to an office, and was therefore required by act of parliament to reside at a distance from Bedford, the Court would not grant a rule for a *quo warranto* until the defendant had been expressly *amoved* by the corporation. In *Rex v. Pateman* (c), where the defendant had been appointed to an office in a corporation, incompatible with another office which he previously held in the same corporation, Lord Kenyon said that the appointment was an act of the corporation, and equivalent to an amotion. The defendant in this case has not been either actually or impliedly amoved from his situation. By the provisions of the charter of Norwich,

Concurrence
of grantor and
grantee.

Amotion.

(a) *Noy's Rep.* 78.

(b) 2 T. R. 772.

(c) *Ibid.* 779.

1832.
The King
v.
PATTERSON.

the defendant might have been elected alderman even against his will, and was liable to a penalty if he refused to serve or neglected to perform the duties of the office without reasonable cause. And yet, according to the argument, he is at liberty to free himself from the burthen of his first office without the permission of the corporation who elected him, by accepting some office, the duties of which are incompatible with those of an alderman of this city.

Cur. adhi. vult.

PARKE, J. in the course of Michaelmas term, 1832, delivered the judgment of the Court. After stating the substance of the pleadings, his lordship proceeded as follows:

Two questions arose on these pleadings, and were argued at the bar: the first, whether the rejoinder was sufficient; the second, whether the appointment to and acceptance of the office of treasurer of the county of the city, did or did not vacate the offices of alderman and justice of the peace, or either of them.

First point.

The first question depends upon the materiality of the averment in each replication, "that the defendant gave such security, as therein is before mentioned, to the mayor, recorder, steward, and aldermen, being justices of the peace;" such replication containing also an averment, that "he accepted and took upon himself the office of treasurer, and entered upon the discharge of the duties of his office." If the giving of security be a condition precedent to becoming treasurer, or being responsible and accountable as such, the averment is material and traversable; if it be not, it is immaterial. And we are of opinion that by the form of the appointment, stated in the replications, it is not made a condition precedent, if it be not so by the statute 12 Geo. 2, c. 29, s. 6, in pursuance of which statute the appointment took place; and by the statute we think it is not made a condition precedent either to the enjoyment of the office or to the liability to account for the moneys received by virtue of the office. The statute appears to us in this

respect to be directory only; and if so, the appointment of the defendant was complete, though such security was not given; and the rejoinders are all bad in law, as tendering issue on an immaterial allegation.

1882.
The King
v.
PATTERSON.

The second question is one of more difficulty and importance. It was admitted on the argument that the offices of county treasurer and of justice of the peace are incompatible: it is also admitted on the pleadings that the defendant was appointed to and accepted the office of county treasurer. The question is, what is the effect of that appointment and acceptance. Without acceptance by the person appointed, it is clear that the first office would not be avoided (a). After acceptance, is the first office become absolutely void, so that the party may be ousted in quo warranto? If we were to hold that the office of justice of the peace is absolutely void in this case, it would be difficult not to come to the same conclusion in every case in which a justice of the peace accepted an office within his district, accountable before justices or at sessions; that, for instance, of overseer of the poor, or churchwarden, or surveyor of the highways; and it would be of mischievous consequence to the interest of the public, if it were to be decided that a magistrate could not discharge the important duties of those subordinate situations without losing entirely and for ever his superior office.

Second point.

This very question, how far the office of justice of the peace and the office of overseer are compatible, came before the Court in *Rex v. Gayer* (b). The Court gave no judicial opinion upon it; but from the form of the proceeding, which was an application to quash an order of sessions discharging an order of two justices, appointing the defendant, who was an acting justice of the peace for the county, to be an overseer of the poor, it seems to have been considered, both at the bar and by the bench, that if the two offices were incompatible, the consequence would be, that the party should be discharged from that of over-

(a) *Noy's Rep.* 78; *Dyer*, 382 b, (b) 1 *Burr.* 245.
in notis.

1884.

 The KING
 v.
 PATTERSON.

seer, as having been *disqualified or exempted*, and not from that of justice of the peace, as being *vacated* by the appointment to be overseer. Again, it would be an anomaly in the law, if a public officer, who could not directly resign, or be removed, without the concurrence or privity of a superior authority, should be able to accomplish the same object indirectly by an acceptance of an incompatible office. A sheriff, for instance, who is indictable for not accepting and exercising his office (*a*), might relieve himself, without the concurrence of the crown, by procuring himself to be elected to the office of coroner (*b*); and other instances of the same kind might be put.

These considerations lead us to doubt whether the general proposition can be supported, that under all circumstances the acceptance of an incompatible office, by whomsoever the appointment to it is made, *absolutely avoids* a former office; and upon reference to the authorities, we think that this proposition is not made out, but that it must be limited and qualified; and that such acceptance (though it may be ground of *amotion*) does not operate as an absolute avoidance in those cases where a person cannot divest himself of an office by his own mere act, but requires the concurrence of another authority to his resignation or *amotion*, unless that authority is privy and consenting to the second appointment.

In the earlier text-books and authorities, the ground upon which the acceptance of an incompatible office avoids another, is not distinctly explained. In the cases, however, of *Gage v. Peacock* (*c*) and *Verrior v. The Mayor of Sandwich* (*d*), it appears to have been argued on the ground of an *implied surrender*; and in some more modern cases, where the first office is clearly avoided, the reason expressly stated is, that it operates as an implied surrender of the former office *or, as an amotion from it*. In *Rex v. Tre-*

(a) 2 Mod. 300; Com. Dig. tit.
Viscount, (A. 2.)

(b) *Vide ante*, 615, (a).

(c) Noy, Rep. 12.

(d) 2 Keb. 92, (cited *ante*, 614,
post, 623 (i), from *Siderfin*).

lucency (a), Lord Mansfield puts it on the former ground; and that opinion is adopted by Buller, J., in *Milward v. Thatcher* (b). Lord Kenyon, in *Rex v. Puteman* (c), puts it on the latter. See also the opinion of Littledale, J. in *Rex v. Hughes* (d).

If this view of the subject be correct, it seems to follow that the acceptance of the second office will not absolutely avoid the first, unless it be made by, or with the privity of, that authority which has the power to accept the surrender of the first or to remove from it.

Upon reference to the authorities, it will be found that in most, if not in all, of the cases where the office has been held to be absolutely void, a surrender to and acceptance by the same persons who appointed to the second office, or an motion by them, would have been good. A forester by patent for life, or warden of a forest, made justice in eyre of the same forest, *pro hac vice* (e),—a justice of Common Pleas, made justice of King's Bench (f),—a remembrancer of the Exchequer for life, made a baron of the Exchequer (g),—a flag-officer, appointed to another command (h)—are all instances in which both appointments are made by the crown. The case of a town-clerk, made mayor (i),—a jurat, made town-clerk (k),—a burgess, made alderman (l)—all appear to be cases of appointments by the corporation at large. In *Rex v. Tizard* (m) it does not appear by the pleadings in the case whether the mayor, alderman and bailiffs, who appointed to the office of town-clerk, had or had not the power of accepting the resignation of that of alderman; and as this objection was not stated, we do not consider the case as forming an exception to the position

1822.
The King
v.
Patterson.

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| (a) 3 Burr. 1615. | II. Bl. 261, |
| (b) 2 T. R. 87. | (i) 1 Siderf. 305. |
| (c) Ibid. 777. | (k) <i>Milward v. Thatcher</i> , 2 T. |
| (d) 5 Barn. & Cressw. 886; 8 | R. 81. |
| Dowl. & Ryl. 708. | (l) <i>Rex v. Hughes</i> , 5 Barn. & |
| (e) 4 Inst. 310. | Cressw. 886; 8 Dowl. & Ryl. 708; |
| (f) Dyer, 158 b. | <i>Rex v. Hubball</i> , 6 Bar. & Cres. 139. |
| (g) Ibid. 197 b. | (m) 9 Barn. & Cressw. 419; 4 |
| (h) <i>Johnstone v. Margetson</i> , 1 | Mann. & Ryl. 400. |

1834.

 The KING
 v.
 PATTESON.

now laid down. The cases of a forester appointed by the crown, and elected verderor by the freeholders, Sir *Charles Howard's* case (a),—a coroner made a verderor, *Com. Dig.* Officer (G. 4) (b)—only shew that the acceptance of the new appointment is *a ground of discharge* from the old one by the crown; and that this is so, further appears from the argument of *Noy*, who said “that he had seen precedents that divers offices (c) had been *seized* because one had so many, *quod eis intendere nequit*.” In 1 *Siderf.* 305 (d), where it is said that the chief justice cannot be prothonotary in his own court, it is not said that by accepting the latter office, the office of chief justice would be void.

Upon principle, (not conflicting with any of the authorities,) it seems that an officer cannot avoid his office by accepting another, unless his office be such as he could have determined by his own act simply, or unless that authority concur in the new appointment which could have accepted the surrender of, or could have removed from, the old one.

The defendant is an alderman, and by virtue of that office, a justice; the office of alderman he could only surrender to the corporation at large, or, (by charter or prescription, or by bye-law,) to a select body.

That the assent of the corporation to the resignation of an office is necessary, appears from the following authorities. In 2 *Roll. Abr.* 456 (e), it is said that “an alderman, *by the assent of the corporation*, can resign and relinquish his office to the corporation; for there is no reason why he should be bound to execute and continue in his office for all his life against his will; and the corporation may take such surrender of right, without any power given by the charter to take it.” In *Rex v. Tidderley* (f) it is laid down that every corporation has *power to take a resignation*. In *Taylor's* case (g) the question was, whether an

(a) Sir W. Jones, 295.

(b) Citing *Reg. Brev.* 177 b; in 9 *Vin. Abr.* 151, pl. 3.
 F. N. B. 164, N.

(c) Civil, not *ecclesiastical*.

(d) *Verrior v. Mayor of Sandwich*.

(e) *Hazard's* case, (translated

(f) 1 *Siderf.* 14.

(g) *Popham*, 133—reported in
 2 *Roll. Rep.* 11, as *Hazard's* case.

alderman might surrender. *Coventry*, solicitor, said he could not, and cited *Medlicott's* case, where the opinion of the Court was that he could not; but, per *Dodderidge*, "perhaps they *would not accept* his surrender." In *Com. Dig. Franchises*, (F. 30,) it is said "every member or officer of a corporation may resign his place or office." Nothing is mentioned of *acceptance*; but as this is followed by these words, "and a corporation has power to *take* such resignation," it seems to be implied that the corporation must *accept* the resignation in order to render it valid. *Rex v. Mayor of Rippon* (a) and *Regina v. Lane* (b) are authorities to the same effect.

If then the assent of the corporation at large, or a select body, be required to make a resignation valid and complete, the defendant could not in this case have effectually got rid of his offices of justice and alderman merely by his own act, and the adoption of it by the other justices and aldermen in sessions assembled; and if so, there can be no implied surrender of those offices by acceptance of an incompatible appointment from them assembled and acting in the same character. The offices of justice and alderman therefore did not become absolutely void by that acceptance.

It must not, however, be supposed that in laying this down in the present instance, the Court means in the slightest degree to trench upon the rule, that where two offices are incompatible they cannot be held together. This is a rule founded on the plainest principles of public policy, and which has obtained from very early times.

It is not perhaps necessary for the Court to decide more than this,—that the circumstance of the defendant's being appointed to and accepting the office of treasurer, did not *vacate* that of alderman and justice. But as it may be objected that if so, the two offices may yet be held together, it may be as well to add, that the acceptance of the treasurer'ship may perhaps be a *ground of amotion* by the cor-

1832.
The KING
v.
PATTESON.

(a) 1 *Ld. Raym.* 563.

(b) 2 *Ld. Raym.* 1304.

1832.

 The KING
 v.
 PATTESON.

porate body; and further, that it seems to us that the defendant was not a person capable under 12 Geo. 2, c. 29, s. 6, as long as he was an alderman and a justice, of being nominated and appointed treasurer. Though there is no direct prohibition in the statute of such an appointment, it is clear that it never contemplated the possibility of the justices appointing one of themselves. By the 6th section they are to appoint a person resident in the county, he first giving sufficient security, and he is to pay the money in his hands according to their orders; and by the 7th section he is to keep books of entries of the sums received and paid by him, and to deliver in accounts, upon oath, if required, of such sums, and to lay before the justices at sessions proper vouchers for the same. He is moreover, by the 11th section, to be continued in office or to be removed at their pleasure, and to be allowed such sum for his care and pains in the execution of his trust, not exceeding 20*l.* by the year, as they in their discretion shall think fit. All these provisions shew that he is intended to be a mere ministerial officer *under* the justices, and not to be one of their own body. And therefore if, as we think is the case here, the justices of the county of the city of Norwich and the defendant could not, for the reasons above given by their own acts—the justices by appointing to, and the defendant by accepting the office of treasurer—vacate his office of alderman and justice, to which, under the king's charter, the defendant was elected by the citizens duly assembled at a corporate meeting for that purpose, and the offices could not be held together,—it follows, as a necessary consequence, that the defendant was not eligible to that office; and that if he still fills it in conjunction with his character of alderman and justice, he may by some legal proceeding be removed. And this conclusion is materially strengthened by the case before cited of *Rex v. Gayer (a)*.

(a) 1 Burr. 945.

For these reasons we are of opinion that the judgment of the Court must be for the defendant.

This judgment must be considered as that of my brothers *Littledale*, *Taunton*, and myself. My brother *Patteson* has taken no part in the consideration of the case, for private reasons. Lord *Tenterden*, I believe, entirely concurred in this judgment (a).

1832.

The King
v.
PATTERSON.

Judgment for the defendant.

(a) Lord *Tenterden*, during the argument, stated that on his being appointed a judge of this Court, he had surrendered the patent treating him a judge of the Court of Common Pleas.

HORN v. ION.

ASSUMPSIT. Plea: first, the general issue: secondly, bankruptcy, generally: thirdly, bankruptcy and certificate specially. The replication to the last plea averred, that the certificate had been obtained by the defendant unfairly and by fraud; which, the defendant in his rejoinder denied.

At the trial before *Parke*, J. at the Westmoreland summer assizes, 1831, it appeared that *Allen*, a creditor, had been induced to sign the certificate by a promise on the part of the defendant to pay the whole of the debt. It was objected on the part of the defendant, that fraud in the obtaining of a certificate could not, under the 6 *Geo. 4*, c. 16, s. 121, be insisted upon at nisi prius (b). The learned

Fraud in obtaining a certificate of conformity may, under 6 *Geo. 4*, c. 16, be given in evidence in answer to the general plea of bankruptcy.

(b) Upon the third issue, supposing it to have stood alone, this evidence would have been clearly admissible, even assuming the defendant to have been entitled to object that fraud does not avoid a certificate at law. The establishing of this proposition on the

part of the defendant would merely have shown that the replication to the third plea is bad in law, and the defendant would have been entitled to call upon the Court to arrest a judgment founded upon a verdict establishing the existence of the fraud. But the insufficiency

1852.


HORN
v.
ION.

judge, however, was of opinion that the fraud was a good answer to the plea of bankruptcy, and directed the jury, in case they thought that the defendant had promised *Allen* to pay him in full, and that *Allen* had been by such promise induced to sign the certificate, they ought to find for the plaintiff. The jury returned their verdict for the plaintiff, and leave was given to the defendant to move to enter a nonsuit. In last Michaelmas term *T. Clarkson* obtained a rule nisi; against which, in last Trinity term,

John Williams and *Archbold* shewed case. This certificate is void on the general ground of fraud. It is not requisite that it should be so declared by any express provision in the Bankrupt Act. *Robson v. Calze (a)* is a stronger case than the present: There money was paid by a friend of the bankrupt to two creditors, who were thereby induced to sign the certificate, but without the knowledge of the bankrupt, and yet it was held that on the general ground of fraud this certificate was void. *Holland v. Palmer (b)*. [*Parke, J.* The question which we are to consider, is, whether since the passing of the late bankrupt act, a plaintiff can at nisi prius shew that the certificate was obtained by fraud, or whether he can only use fraud as a ground for applying to the Chancellor to set the certificate aside.] Without reference to any statute the certificate is void, for at common law fraud makes every transaction null. The legislature may have omitted to insert in the new act the provision contained in the act of 5 Geo. 2., c. 30, s. 7, making fraud in obtaining the certificate an answer to

in point of law, of a replication upon which issue is joined, and in support of whatever evidence is offered, is not a ground of nonsuit. Where however, as here, other issues are joined upon pleas which go to the whole cause of action, and one of those pleas is *prima facie* established, the defendant will be entitled to a non-

suit if no further evidence be tendered by the plaintiff than that which will leave one complete cause of defence unshaken; since in such a state of things the truth or falsehood of all other allegations upon which issue has been taken, becomes immaterial.

(a) 1 Dougl. 228.

(b) 1 Bos. & Pul. 95.

a plea of bankruptcy, because they thought it unnecessary, such being already the law of the land.

1832.

HARR
v.
ION.

Th. Clarkson, in support of the rule. The two cases which have been cited, of *Robson v. Calce*, and *Holland v. Palmer*, were decided when 5 Geo. 4 was still in force. Under 6 Geo. 4, c. 16, s. 121, it is sufficient that a bankrupt has obtained his certificate of conformity signed and allowed. That has been done in this case. In the former act it was expressly provided that if the plaintiff could prove at the trial that the certificate had been obtained unfairly and by fraud, such certificate should not operate as a discharge from debts incurred before bankruptcy. Here, this provision is entirely omitted, which evidently shows that the legislature intended that fraud should no longer be an answer to a certificate. In the 130th section it is enacted, that a certificate shall be void if the bankrupt shall have lost by gaming, in one day 20*l.*, or within a year before his bankruptcy, 200*l.* by any contract for the purchase or sale of any government or other stock under certain circumstances, or shall after an act of bankruptcy, and in contemplation of bankruptcy, have destroyed, altered, mutilated, or falsified any of his books &c., with intent to defraud his creditors, or shall have concealed property to the value of 10*l.*, or, being privy thereto, shall not have disclosed that any person had proved a false debt under the commission. It must be presumed that if the legislature had intended that the certificate should be void in other cases besides those specified, such other cases would have been specified also.

Cur. adv. vult.

PARRY, J., in Michaelmas term, 1832, delivered the judgment of the Court.

The question in this case was, whether under the 6 Geo. 4, c. 16, s. 121, it is competent for the plaintiff on the trial of a cause to insist on the objection to a certificate, that

1832.

 The King
 v.
 PATTERSON.

the defendant might have been elected alderman even against his will, and was liable to a penalty if he refused to serve or neglected to perform the duties of the office without reasonable cause. And yet, according to the argument, he is at liberty to free himself from the burthen of his first office without the permission of the corporation who elected him, by accepting some office, the duties of which are incompatible with those of an alderman of this city.

Car. add. vult.

PARKE, J. in the course of Michaelmas term, 1832, delivered the judgment of the Court. After stating the substance of the pleadings, his lordship proceeded as follows :

Two questions arose on these pleadings, and were argued at the bar: the first, whether the rejoinder was sufficient; the second, whether the appointment to and acceptance of the office of treasurer of the county of the city, did or did not vacate the offices of alderman and justice of the peace, or either of them.

First point.

The first question depends upon the materiality of the averment in each replication; "that the defendant gave such security, as therein is before mentioned, to the mayor, recorder, steward, and aldermen, being justices of the peace;" such replication containing also an averment, that "he accepted and took upon himself the office of treasurer, and entered upon the discharge of the duties of his office." If the giving of security be a condition precedent to becoming treasurer, or being responsible and accountable as such, the averment is material and traversable; if it be not, it is immaterial. And we are of opinion that by the form of the appointment, stated in the replications, it is not made a condition precedent, if it be not so by the statute 12 Geo. 2, c. 29, s. 6, in pursuance of which statute the appointment took place; and by the statute we think it is not made a condition precedent either to the enjoyment of the office or to the liability to account for the moneys received by virtue of the office. The statute appears to us in this

respect to be directory only; and if so, the appointment of the defendant was complete, though such security was not given; and the rejoinders are all bad in law, as tendering issue on an immaterial allegation.

1882.
The King
v.
PATTERSON.

The second question is one of more difficulty and importance. It was admitted on the argument that the offices of county treasurer and of justice of the peace are incompatible: it is also admitted on the pleadings that the defendant was appointed to and accepted the office of county treasurer. The question is, what is the effect of that appointment and acceptance. Without acceptance by the person appointed, it is clear that the first office would not be avoided (a). After acceptance, is the first office become absolutely void, so that the party may be ousted in quo warranto? If we were to hold that the office of justice of the peace is absolutely void in this case, it would be difficult not to come to the same conclusion in every case in which a justice of the peace accepted an office within his district, accountable before justices or at sessions; that, for instance, of overseer of the poor, or churchwarden, or surveyor of the highways; and it would be of mischievous consequence to the interest of the public, if it were to be decided that a magistrate could not discharge the important duties of those subordinate situations without losing entirely and for ever his superior office.

Second point.

This very question, how far the office of justice of the peace and the office of overseer are compatible, came before the Court in *Rex v. Gayer* (b). The Court gave no judicial opinion upon it; but from the form of the proceeding, which was an application to quash an order of sessions discharging an order of two justices, appointing the defendant, who was an acting justice of the peace for the county, to be an overseer of the poor, it seems to have been considered, both at the bar and by the bench, that if the two offices were incompatible, the consequence would be, that the party should be discharged from that of over-

(a) Noy's Rep. 78; Dyer, 382 b. (b) 1 Burr. 245.
in notis.

1832.

Notwithstanding a certificate obtained before 6 Geo. 4, c. 16, under a second commission, which had not produced 15s. in the pound, the liability of the effects of the bankrupt, which existed at the time of the passing of that act, is not removed by the 127th section.

A certificate so obtained is therefore no absolute bar to an action brought on a debt prior to the second bankruptcy.

For this purpose a bankruptcy after a discharge under the insolvent debtors' act, stands upon the same ground as a second bankruptcy, although the debt sought to be enforced be one which would have been discharged under the insolvent debtors' act but for the circumstance of its having been omitted by the insolvent in his schedule.

CAREW v. EDWARDS.

DEBT on bond. The defendant pleaded *non est factum*, and also the general plea of bankruptcy. At the trial before Patteson, J., at the sittings at Westminster after Hilary term, 1832, it appeared that since the date of the bond the defendant had been discharged under the insolvent debtors' act, but had omitted to insert the bond in his schedule. Afterwards a commission of bankrupt issued against the defendant, under which he was declared bankrupt; and before the 2nd of May, 1825, (the day on which the 6 Geo. 4, c. 16, received the royal assent,) he obtained his certificate. The bankrupt's estate had not produced 15s. in the pound.

For the plaintiff it was said, that he was entitled to a verdict and judgment against the effects of the bankrupt by 5 Geo. 2, c. 30, s. 9. For the defendant it was contended, that by 6 Geo. 4, c. 16, s. 127, the bankrupt's effects were vested in his assignees, and his certificate was a bar to the action. The learned judge was of opinion that the action was not barred by the certificate, and a verdict was found for the plaintiff. A rule nisi for a new trial having been obtained on the ground of misdirection; in Michaelmas term, 1832.

Sir J. Scarlett and Follett shewed cause. By 6 Geo. 4, c. 16, it is enacted (sect. 135) "that nothing herein contained shall affect or lessen any right, claim, demand or remedy, which any person now has under any commission of bankrupt, or upon or against any bankrupt against whom any commission has or shall have issued, except as is herein specifically enacted." The plaintiff in this case had, at the time of passing that statute, a right of action against the bankrupt; and there is no specific enactment by which that right is taken away.

of its having been omitted by the insolvent in his schedule.

White, contra. By the 127th section it is provided, that "if any person who shall have been discharged by any insolvent act shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid," &c. These words are retrospective as well as prospective, and evidently refer to a bankrupt who had obtained his certificate at the time of passing the statute. So, by section 121, "every bankrupt who shall have duly surrendered and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt." In *Robertson v. Score* (a), the Court was of opinion that this section applied to cases in which the first certificate had been granted under a commission issued before the passing of the act.

1832.
CAREW
v.
EDWARDS.

Cur. adv. vult.

In the course of Michaelmas term, 1832, judgment was delivered by

DENMAN, C. J., who, after stating the pleadings and evidence, proceeded as follows:—The plaintiff contended that he was entitled to a verdict and judgment against the effects of the defendant, under 5 *Geo.* 2, c. 30, s. 9. The defendant, on the other hand, contended that by the 127th section of 6 *Geo.* 4, c. 16, his effects were vested in his assignees, and that therefore his certificate was an absolute bar to the action, according to *Robertson v. Score*, in which the certificate pleaded in bar had been obtained after the passing of 6 *Geo.* 4, c. 16, a former certificate having been obtained by the party, *under a commission issued before that act.* The question therefore is, whether the 127th section of 6 *Geo.* 4, c. 16, has a retrospective operation, so as to vest in the assignees of a bankrupt under a second commission, where the estate does not pay 15s. in the pound, and where the bankrupt has obtained his certificate

(a) 3 Barn. & Adol. 338.

1832.

CAREW

v.

EDWARDS.

under the 5 Geo. 2, c. 30, those effects which did not vest in his assignees under that act, but were liable to be taken in execution by his creditors. The language of the 127th section of 6 Geo. 4, c. 16, which appears to have been taken, with some omissions, from the 9th section of 3 Geo. 2, c. 30, is by no means clear, and it is extremely difficult to collect from it whether the legislature intended to alter the effect of a certificate obtained prior to that act or not. If it did, the rights of creditors and of the bankrupt himself would be much affected; and by the 135th section of the act, we find it enacted "that nothing herein contained shall render invalid any commission of bankrupt now subsisting, or which shall be subsisting at the time this act shall take effect, or any proceedings which may have been had thereunder, or affect or lessen any right, claim, demand or remedy, which any person now has thereunder, or upon or against any bankrupt against whom any commission has or shall have issued, except as is herein specifically enacted."

Now we cannot find any words in the 127th section by which the right of a creditor, situated as the plaintiff was, to sue the bankrupt and recover a judgment, and have execution against his effects, is *specifically* and expressly taken away, or by which the effects of a bankrupt situated as this defendant was, are *specifically* and expressly vested in his assignees.

We think, therefore, that the certificate is no absolute bar. The grounds of our judgment leave the case of *Robertson v. Score* (a) wholly untouched.

Rule discharged.

(a) 3 Barn. & Adol. 328.

1839.

CASTLEDINE and another v. MUNDY (in error).

ERROR from the judgment of the Court of Common Pleas, in an action of trespass for forcible entry, brought by *Mundy* against *John* and *Matthew Castledine*. The declaration contained three counts; one for a forcible entry on 8 Hen. 6, c. 9, and two for trespasses at common law. The defendants appeared in person and suffered judgment by default, and general damages were assessed on all the counts, for the treble amount of which, and treble costs, final judgment was given. *J. and M. Castledine* assigned error as follows:—"That the said *Matthew* appeared in the suit aforesaid in his own proper person, nevertheless the said *Matthew*, at the time of his appearance, and also at the time of giving the judgment aforesaid, was under the age of twenty-one years, to wit, of the age of seventeen years, and no more; in which case the said *Matthew* ought to have admitted to appear in the Court aforesaid, to defend the aforesaid suit, by his guardian, and not in his own proper person, therefore in that there is manifest error. Wherefore they pray that the judgment aforesaid may be revoked, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the judgment aforesaid, &c. To this *Mundy*, the defendant in error, pleaded *in nullo est erratum*. This case was argued in last Trinity term.

If an infant appear in person, not by guardian or prochein amy, it is error in fact.

Such error may be assigned in the court by which the judgment is pronounced.

So it may be assigned in a court of error, except *Dom. Proc.* and (before 1 W. 4, c. 70,) the court of error constituted by 27 Eliz. c. 8.

The court is bound ex officio to reverse a judgment for errors of law apparent on the record, though not assigned as errors by the plaintiff in error.

Platt, for the plaintiffs in error, contended that the defendant *Matthew* could not appear in person to defend, but only by guardian, *Frescobaldi v. Kinaston* (a); that if this was error in fact not well assigned, or no error at all, still the plea of *in nullo est erratum* being analogous to a demurrer, puts in issue the goodness of the whole record, *Le Bret v. Papillon* (b); and that the record was bad, inasmuch as the damages were assessed generally upon all

(a) 2 Str. 783.

(b) 4 East, 509.

1892.
 CASTLEDINE
 v.
 MUNDY.

three counts, the defendants below being liable to treble damages and costs only upon the count upon the statute.

Fynes Ginton, contra, contended that the assignment of errors ought to have concluded with a verification, *King v. Gosper* (a), and that there was an indirect attempt to assign error in law, and also error in fact, which may not be. In *Frescobaldi v. Kinaston*, the defendant appeared by attorney; here he appeared in person. [Parke, J. referred to *Anon. Sayer's Reports*, 51, and *Co. Lit.* 135 b, to shew that an infant cannot appear either by attorney or in person.] This is not ground for a total reversal of the judgment. [Parke, J. referred to *Bird and another v. Orms* (b), and *King v. Marlborough and Craker* (c).] In these cases the judgment was after verdict; here judgment went by default. They were cases in tort, and occurred before *Merryweather v. Nixan* (d), which first decided that co-defendants in tort are not liable to contribution. [Lord Tenterden, C. J. Will a writ of error for matter of fact lie in this Court on a judgment of the Common Pleas? It is laid down to the contrary in *Com. Dig. Pleader*, 3, (B. 1,) citing 1 *Siderfin*, 208.]

Platt, in reply, answered, that errors of fact were assigned upon writs of error in this Court upon judgment in C. B. in *Frescobaldi v. Kinaston* and *Bird v. Orms*.

Cur. adv. vult.

The judgment of the Court was, in Michaelmas term, 1892, delivered by

PARKE, J. (who, after stating the pleadings, &c. proceeded as follows:—An assignment of error in fact, ought to conclude with an “*hoc paratus est verificare*,” and the case of *King v. Gosper and Shire* is in point, that such an assignment of error as this, without a verification,

(a) Yelv. 58.

(c) Cro. Jac. 303.

(b) Cro. Jac. 289.

(d) 8 T. R. 186.

is bad; and if there be no other error on the record, the judgment ought to be affirmed. But in this case the judgment is clearly erroneous, for general damages are assessed on all the counts, and it is therefore impossible to say what portion is to be ascribed to the first count, on which alone the damages and costs could by law be trebled; and yet judgment is given for the treble amount of the whole. The question then is, whether it is competent for the plaintiff in error to avail himself of this objection, or, more properly, whether the Court is bound *ex officio* to take notice of it, there being no assignment of error in law. The general rule is, that the Court *ex officio* must give the proper judgment, according to the right appearing upon the whole record; *Le Bret v. Papillon* (a), *Charnley v. Winstanley* (b), *Fraunces's case* (c). In a case (d) cited in *Dive v. Manningham* (e), on not guilty by one, found against him, and a plea in bar by another, found for him, it is said, "inasmuch as it appears to the judges by the record, that the plaintiff had no title, they *ex officio* ought to give judgment against the plaintiff;" and afterwards it is said, (f) "so always if it appear to the Court that the plaintiff has no title, he shall not have judgment, although the defendant admits his title; and though the defendant by his bad conclusion has concluded himself of his advantage, the plaintiffs shall be barred by the Court *ex officio*, if so be it appears that he has no title." And there is no difference in this respect between the office of a court of error, and of a court of original jurisdiction (g). Thus, in *Bishop's case* (h), the Court agreed that where an original writ was removed by certiorari, and varied from the declaration, the judgment should be reversed, although that error was not assigned. In *Carleton v. Montague* (i), Lord Holt says, "If a bad plea in bar be pleaded to a bad declaration, or to a bad assignment of error, it is idle; and

1684.

CASTLEDINE
v.
MUNDY.

(a) 4 East, 502.

(b) 5 East, 266.

(c) 8 Co. Rep. 93 a.

(d) H. 7 E. 4, fo. 31, pl. 18.

(e) Plowden, 66 b.

(f) By Montague, C.J., in *Dive v. Manningham*.

(g) 4 East, 502.

(h) 5 Co. Rep. 37 a.

(i) 6 Mod. 206.

1852.

 CASTLEDINE
 v.
 MUNDY.

the Court shall take no notice of the insufficiency of it, but shall judge on the record." The result of these authorities is, that the Court ought to give judgment of reversal, if there be error in law, notwithstanding that no error in law is assigned, and though it be true that a plaintiff in error will thus have the same advantage, indirectly, as if error in fact and in law were both assigned, (which cannot be permitted directly,) this does not appear to us to be a valid objection. It is somewhat analogous to the case of a plea and demurrer to the declaration, which cannot be joined, and yet a defendant, after a plea, may, on demurrer to the plea, in arrest of judgment, or on a writ of error, take all the objections which are not cured by the plea or otherwise, and which he could have done on general demurrer to the declaration. One question was raised on argument, whether a writ of error for a matter of fact would lie in this Court on a judgment of the Common Pleas. It is clear from the authorities, that such a writ of error *may* be brought in the Court of Common Pleas, but there is no authority that it *must*. It will not lie in the Exchequer Chamber; not because that Court could not try an issue, but because the statute 27 *Eliz.* c. 8, under which it was constituted, was enacted to give a more speedy remedy for error which lay in parliament; but errors in fact were examinable in the King's Bench, and not in parliament, and therefore the Court of Exchequer Chamber had no cognizance of such errors; *Roe v. Sir John More* (b). But that a writ of error for errors in fact will lie in the King's Bench from the Common Pleas (c), the cases cited in argument shew, for they were instances where such errors were assigned in this Court. The judgment of the Court below must, for these reasons, be reversed.

Judgment reversed.

(a) 6 Mod. 308; S. C. ib. 113; 1 Salk. 268; 3 Salk. 390; 2 Ld. Raym. 1005; and Lord Holt, 275.

And see *Hert v. Garamer*, T. 21 E. 3, fo. 54, pl. 3; *Longo Quinto*,

fo. 96 b, per *Leiton and Billing*, JJ.; M. 8 E. 4, fo. 8, pl. 3, per *Littleton and Moyle*, JJ.

(b) 2 Comyns, Rep. 597.

(c) *Contrà* 1 Sid. 208, *obiter*.

1832.

BUSSEY v. STOREY.

ASSUMPSIT for money had and received. Plea: the general issue. At the trial before *Bayley*, B. at the Durham summer assizes, 1830, a special verdict to the following effect was found:—

By 18 *Geo.* 2, c. 8, for repairing the road from Borough-bridge, through Northallerton, to Croft Bridge on the Tees, and thence, through Darlington, to Durham, trustees were appointed for ordering, amending, surveying, and keeping in repair the said road, and were empowered to erect turnpikes and toll-houses in or across or upon any part or parts of the said road, and to take there certain tolls, to be applied to amending and keeping in repair the said road.

By 22 *Geo.* 2, c. 32, the terms and powers granted by the last act were enlarged.

By 32 *Geo.* 3, c. 18, the two former acts were consolidated, and the powers enlarged and altered for more effectually repairing and keeping in repair the said road, which in this act is described in the same manner as in the title of 18 *Geo.* 2, c. 8.

By 41 *Geo.* 3, c. 4, the last act was amended.

By 52 *Geo.* 3, c. 38, for more effectually repairing the road from Boroughbridge, in the county of York, to the city of Durham, and for consolidating and adding to the powers &c. of the former acts, the former acts were repealed, and new tolls and a new term were granted. The 26th section relates to the continuing or erecting of toll-gates and toll-houses across and upon the road thereby intended to be repaired. By the 25th section, the tolls granted by that act are to be demanded and taken at each toll-gate continued or erected by virtue of that act, before the horse or carriage in respect of which the toll is payable shall be permitted to pass through the same. By section 37 it was enacted, that no tolls should be paid for any horses, &c., 'which should only cross the said road, and should not

Where a local turnpike act imposes toll on carriages passing 100 yards upon a turnpike road from A. to B., but throws upon the county the repairs of bridges and of approaches to bridges on that line of road, such toll is incurred by a carriage passing 100 yards along the road, although part of that distance be made up of the approaches to one of the bridges repaired by the county.

1832.

BUSSEY

v.

STOREY.

pass more than 100 yards thereon. By the 68th section, all persons, counties, townships, parishes, &c., who before the making of the recited acts were liable to repair any part of the said road, or any bridge, drain, or watercourse upon the same, were still to be liable as formerly to such repairs. The 70th section empowers the trustees to compound or agree by the year with the inhabitants or occupiers of any lands of or in any of the parishes, townships, or places, in which the said road shall lie, for a certain sum in lieu of their statute work, or to compound with the surveyor of the highways for any such parishes, &c., for the statute work liable to be performed within the same; all which composition moneys are to be paid in advance and applied in the repair of the said road (a).

Croft Bridge is a county bridge, which, with an approach on either side of 300 feet, is exclusively repaired by the respective counties of York and Durham, no statute work being performed by the adjoining parishes. At Croft Bridge, upon a part of one of those approaches of 300 feet, the trustees had erected and continued a turnpike for the purpose of taking the tolls authorized to be taken for the road, of which tolls, on the 7th June, 1830, the defendant was collector. On that day the plaintiff came from a side road with two laden carts, into the Durham and Boroughbridge road, at a spot within 300 feet of the Durham end of Croft Bridge, and passed over the bridge, and along the road 86 yards beyond the 300 feet on the York side of the bridge. The defendant refused to allow the plaintiff to pass with his carts and horses until he should have paid the appointed tolls, which amounted to 10d., which tolls the defendant demanded and received from the plaintiff. The plaintiff with his carts and horses did not pass over more than 86 yards of the said road, unless the road over Croft Bridge or the 300 feet at either end thereof, so repaired by the respective

(a) Various other portions of and set out in the argument and the several acts are referred to judgment,

counties of York and Durham, is to be taken as part of the said turnpike road.

The case was argued before *Tindal*, C. J. and *Bayley*, B. in the Court of Pleas of Durham (a), when their lordships being of opinion that the carts of the plaintiff were liable to pay the toll, as having passed over more than 100 yards of the said road, gave judgment for the defendant. A writ of error being brought and the common errors assigned,

1834.

BUSSEY
v.
STOREY.


Cresswell, for the plaintiff in error (b). The question is, whether the plaintiff's carts passed along 100 yards of the road, so as to subject him to the payment of tolls. According to the language of *Bayley*, B. in *The Leeds and Liverpool Canal Company v. Hustler* (c), those who seek to impose a burthen upon the public should take care that their claim rests upon plain and unambiguous language. The language in the acts of parliament, under which it is sought to charge the plaintiff, is by no means unambiguous; and there are several considerations which tend to shew that the legislature cannot have intended that a party by passing along the road over a county bridge with the approaches repaired by the county should be liable to pay tolls to the trustees appointed and continued under these acts. It would be unreasonable; because the party had the use of the bridge free of toll before the passing of the acts, and therefore the tolls are, as respects him, without consideration. The legislature, in granting the tolls to the trustees, must be supposed to have done so in consideration of some return by them; and upon looking into the act it will be seen that the consideration is the repair of the road. Now the object of this and other turnpike acts is, to relieve parishes and townships through which the road runs from the

(a) See the record of a writ of error from Durham, in *Peacock v. Bell*, 1 Wms. Saund. 69. And as to the palatinate jurisdiction, see 4 Inst. 216; Comyns's Digest, title

Franchise, (D. 7.)

(b) The errors were argued in Trinity term, 1832.

(c) 2 Dowl. & Ryl. 556; 1 Barn. & Cressw. 424.

1832.

 BUSSEY
 v.
 STOREY.

burthen of repairing, and not counties; and it was expressly enacted by the 32 *Geo. 3*, c. 118, that all such persons as were before the passing of that act liable to repair any bridge or any particular part of the road, should continue so. The General Turnpike Act^(a) provides (section 34) that no person shall be liable to pay toll who shall only cross and shall not pass more than 100 yards along any turnpike road, "except over some bridge erected at a considerable expense by the trustees of such turnpike road." From this it may be inferred that the legislature did not intend that any person should be liable to toll for passing over a bridge which occasions no expense to the trustees. When ancient toll is payable in consideration of repairing the road, it cannot be claimed except in respect of the part of the road which is repaired by the persons claiming. All these considerations raise a presumption against the liability to pay tolls in respect of a part of the road which the trustees cannot repair. Then comes the question, whether the language of the act imposing the toll is clear and unambiguous; or, more directly, whether the words "the said road" used in the exempting clause of the 58 *Geo. 3*, clearly include, not only the road repaired by the trustees, but also a bridge and 300 feet at each end, repaired by the county. In many parts of the several statutes where the words "the said road" are used, it seems to have been clearly the intention of the legislature to allude exclusively to those parts of it which are to be repaired by the trustees. The road existed free of toll before the statutes were passed, but it being found that the means provided by common law for repairing the road were insufficient, the several acts were passed. By 18 *Geo. 2*, c. 8, provision is made for repairing it;—tolls are granted, which are to be applied to the repair of the said road;—power is given to trustees to widen the said road, and to dig gravel for the purpose of repairing it;—and provision is made respecting the statute work to be done on the roads. These powers and provisions apply

(a) 13 *Geo. 3*, c. 84; and see 14 *Geo. 3*, c. 57.

exclusively to the *road* as distinguished from the *bridge* with its approaches; for it is clear the trustees received no power to widen the bridge or to dig gravel for repairing it; nor is there any statute work to be done upon the bridge or the approaches to it by the adjoining parishes. The 22d Geo. 2, c. 32, uses the expression "*the said roads*" where it cannot have been intended to include the bridge. When by 32 Geo. 3, c. 118, the property in lamps &c., and in the soil gathered off *the said road*, is vested in the trustees, it was not intended to vest in them the lamps &c., and soil of the bridge. By this act the tolls are directed to be taken for the repairs of the *said road*, and to be so applied, and facilities are given for obtaining materials for repairing the *said road*. Now as the trustees have nothing to do with the repairs of Croft Bridge, these provisions cannot apply to it, and therefore the words "*the said roads*" do not include this bridge. The 52 Geo. 3, c. 38, in section 21, speaks of the *said road* as the road *intended to be repaired*. If it be objected that the arguments used apply equally to such parts of the road as are to be repaired *ratione tenuræ*, or by prescription, the answer is, that these special liabilities stand upon the same footing as the liability of parishes to repair, and that therefore upon the parts of the roads in respect of which a liability to repair is cast either upon individuals or upon parishes, the trustees are equally authorized and bound to expend the tolls in repairing them; so that there is a consideration for the payment of the tolls in respect of these portions of the road.

Alexander, contra. In order to make a party who passes with carts or horses, &c. liable to pay tolls, it is only necessary that he should pass along any 100 yards of "the road from Boroughbridge, in the county of York, to the city of Durham." It need not be 100 yards of road which the trustees were liable to repair. There is nothing in any of the acts to warrant this supposition; and as such an exemption, if it existed, would apply equally to all parts of

1832.

 BUSSEY
 v.
 STOREY.

the road which parties are liable to repair *ratione tenuræ*, it would be productive of great inconvenience. By the 25th section of 52 *Geo. 3*, c. 38, (which is the most important act to be considered,) the toll is imposed in clear language upon persons passing with any horse or carriage along *the said road*. In order to see what is meant by the words *the said road*, reference must be had to the title and preamble, from which it will be found that the road referred to is the whole line of road from Boroughbridge to Durham; or reference may be had to the nearest preceding description, which is to be found in sect. 28, and from which it will also appear that "the said road" means the whole line of road between Boroughbridge and Durham. In the 6th section of 22 *Geo. 2*, c. 82, the gate at which the toll in this case was taken is recognized as standing upon the said road at Croft Bridge. In the act of 32 *Geo. 3*, c. 118, county bridges are spoken of as *lying in and upon the said road*.

PARKE, J., in Michaelmas term, 1832, delivered the judgment of the Court. This question arises on a writ of error from the judgment of the two learned judges (*Tindal*, C. J. and *Bayley*, B.), constituting the Court of Pleas of Durham, upon a special verdict. The question is, whether the plaintiff's carts, which passed through the turnpike at Croft Bridge in that county, but did not pass more than 100 yards on the road, exclusive of the part at the end of the bridge, (which the county are bound to repair,) were exempt from toll under the 37th section of 52 *Geo. 3*, c. 38, a local turnpike act. We are of opinion that they were not, and that the judgment of the Court below ought to be affirmed.

This act of parliament repeals those of 32 *Geo. 3*, and 41 *Geo. 3*, the provisions of which and of the older statutes relating to this road, are only so far material as they may aid in the construction of the enactments of the existing statute. In order to decide the point in question, we must look at the language of this act. It is a mistake to suppose, (as was urged in the argument on behalf of the plaintiff in error,)

that the object of this and other turnpike acts is to relieve parishes and townships from the burthen of repairing the highways. Their object is, to improve the roads for the general benefit of the public, by imposing a pecuniary tax in addition to the means already provided by law for that purpose. The obligation to maintain all public roads (with the exception of those which are to be repaired *ratione tenuræ*(a), or *ratione clausuræ*(b),) is a public obligation, and in the nature of a public tax(c). The repairing by parishes or townships of some parts and by counties of other parts, are merely modes which the law has provided for discharging that obligation. It is their share of the public burthen which those districts have to pay, and which is imposed for the general benefit of the community; and tolls are an additional tax for the same purpose. But as this statute does impose a tax, the usual rule of construction must be applied to it which is adopted in similar cases(d), and the subject must not be charged unless the intention to charge clearly and distinctly appear.

Are then the words of this statute clear and distinct? It is intituled "An act for more effectually repairing the road from Boroughbridge, in the county of York, to the city of Durham," and it enacts (section 25) that certain tolls shall be demanded and taken at each and every toll-gate and turnpike which shall be continued or erected by virtue of the act, from any person attending a carriage, before such carriage shall be permitted to pass; but it provides (sect. 37) that no toll shall be taken for any carriages which only *cross* the said road, and shall not pass more than 100 yards *thereon*.


(a) *Vide* *Rex v. Kerrison*, 1 Maule & Selw. 435; *Rex v. Cotton*, 3 Campb. 444; and the cases referred to in the note following.

(b) As to the liability to repair by reason of inclosure or of incroachment (*ratione clausuræ* or *ratione coarctationis*), see *Rex v.*

Stoughton, 2 Wms. Saund. 157, 160 (12); *S. C.* differently reported, 2 Keble, 665; *Armitage*, *ex parte*, Ambler, 295; *Rex v. Skinner*, 5 Esp. N. P. C. 219.

(c) See the judgment of *Parke, J.* in *Rex v. Leake*, *post*, vol. ii. 594.

(d) *Ante*, 641 (c).

1832.

BUSSEY
v.
STOREY.

1832.
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 BUSSEY  
 v.  
 STOREY.

The statute therefore, in clear words, imposes the tax on carriages which go through a turnpike gate and pass more than 100 yards on the said road; and the term "the said road," in grammatical construction, refers either to the title of the act or to the nearest preceding description of the road, which is in section 28: and on either supposition *the road* is the whole space between Boroughbridge and the city of Durham. And, besides, the act (section 68) contemplates that counties will have to repair some parts of the road; and what other parts can those be than the space of 300 feet at the ends of the bridges? Add to this, that the toll-gate in question, which is erected within that distance, is recognized as being on *the road* by 22 Geo. 2, c. 32, s. 6; and no doubt its continuance is authorized by the 21st section of the present act, as a toll-gate "across the road thereby intended to be repaired."

The words therefore of the act are clear; and the construction should be according to those words, unless it can be shewn that such construction would be unreasonable or inconsistent with the apparent intention of the framers of the act. It is said that it would be unreasonable, because toll is given as a compensation for the use of the road, and that the plaintiff had a right to use this part of the road before, without paying toll, and gains nothing by the payment of the toll, because that toll could not be laid out in its improvement. But it is obvious that the first part of this objection applies equally to the parts of the road reparable by parishes, townships, or individuals; and the latter proceeds on an assumption (which, as far as we are aware, is not founded upon any express provision in the act) that the trustees would violate their duty in laying out any portion of their funds upon this part of the road. It is true that they are not likely to be called upon to do so, because the county being in general provided with an ample fund, fulfils its obligation to repair completely and effectually; but if the reverse should happen to be the case, and the public exigency should require it, we do not know that the trustees might not expend

money in repairing this portion of the road. And supposing it were otherwise, and that no part of their funds could be so laid out, it cannot be considered as unreasonable that a person who uses any part of a road (all of which is virtually repaired by the public, though in different modes), should pay something to the public in return.

It appears to us that in this construction there is nothing unreasonable, and certainly nothing inconsistent with the express or implied intention of the legislature, to be collected from other parts of the act. In our opinion no distinction can be made, in respect of the obligation to pay toll, between the parts of the road which are repaired by parishes, townships, or individuals, and those which are repaired by the county. Whatever the liabilities to repair may be, all are alike parts of the road.

The judgment of the Court below must therefore be affirmed.

Judgment affirmed.

In the following Trinity term (1833) *Bussey v. Storey* was relied on in a case in which a question as to the liability to the payment of the toll arose, upon the exemption clause in the General Turnpike Act.

POPE v. LANGWORTHY.

Assumpsit for tolls by the plaintiff, as farmer, renter, and collector of the tolls upon a turnpike road in Somerset. Plea: the general issue. At the trial before *Alderson, J.*, at the Somersetshire summer assizes, 1831, a verdict was found for the plaintiff, subject to a special case, which stated in substance as follows:

By a local act of 10 Geo. 4, intituled, "An Act for more effectually repairing and improving several roads which lead to and through the town and borough of Chard, in the county of Somerset, and for making a new road from Chard to Frampton," it was enacted that the act should be put into execution for the purpose, amongst others, "of amending, altering, diverting, turning, widening, improving, and keeping in repair" several roads, of which the road in question is one. The trustees were empowered to erect turnpikes, toll-gates, &c. upon, across, or near the side of any of the before-mentioned roads, and to receive there certain tolls. All moneys arising from tolls were directed to be applied, after payment of certain incidental expenses and debts, interest due on mortgages, &c. and defraying expenses of building toll-houses, &c.

1832.

BUSSEY  
v.  
STOREY

Under 3 Geo. 4, c. 126, s. 32, (exempting from payment of toll, carriages, &c. "which shall only cross any turnpike-road, or shall not pass above 100 yards *thereon*,") a carriage is not exempt from toll which passes along 100 yards of a road from A. to B., for repairing which trustees have been appointed under a local act, although a part of the 100 yards be a street which, by a subsequent act, the trustees are forbidden to repair.

1832.  
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 POPE
 v.
 LANGWORTHY.

"in defraying the expenses in making or diverting, altering, raising, widening, improving, repairing and preserving the said roads," and lastly in paying off the debts. The trustees were directed not to apply any of the tolls or moneys borrowed, "in or towards the repairing, lighting, or improving any of the streets, highways, or places within the said town and borough of Chard." By virtue of this act the trustees erected a turnpike-gate at the eastern entrance of Chard, upon the road leading from the Crewkerne road to and through Chard, to the Honiton and Ilminster road.

An act of 11th Geo. 4 repealed the clause of 10 Geo. 4, which declared the trustees should not apply the tolls &c. towards repairing &c. any of the streets &c., within the town and borough of Chard, but provided that none of the tolls should be laid out and expended in the repair or improvement of certain streets in Chard therein particularly described. The defendant, on the 25th January, 1831, passed in a carriage from the Ilminster road through the east gate to the Chard-Arms Hotel, in the town of Chard, and on the following day returned in the same manner, on each occasion refusing to pay the toll of 6d. which was demanded of him. From the point where the Ilminster road joins the Chard and Crewkerne road to the east gate, the distance is forty yards; from the same spot to a place called the School-house Porch, is less than a hundred yards; but to the Chard-Arms Hotel the distance is several hundred yards. The road from the School-house Porch to the Hotel is a part of the road which the trustees are restrained from repairing &c. Before the passing of 10 Geo. 4, the trustees repaired the whole road, including the part from the Hotel to the School-house Porch, and ever since that period they have exercised controul over the part which they are restrained from repairing, by preventing nuisances upon it.

The question for the opinion of the Court is, whether, under the exempting clause in the General Turnpike Act (3 Geo. 4, c. 126, s. 32), which exempts all horses, carriages, &c. "which shall only cross any turnpike-road, or shall not pass above 100 yards thereon," the defendant was exempted from the payment of toll at the eastern gate of Chard.

Follett, for the plaintiff, relied on the case of *Bussey v. Storey* as being similar in principle to the case before the Court. He was stopped by the Court.

Erle, for the defendant. This defendant is, within the intention of the legislature, exempted from the payment of tolls. *Hammond v. Breuer* (a) shows that it has been considered inexpedient that tolls should be taken in respect of a turnpike-road through a town. The meaning of the act must be, that a person shall pay toll if he passes 100 yards on the road of the trustees. If this be not so, the townspeople passing 98 yards upon the streets of the town, would be liable to toll if they went two yards beyond them, which is to say, that whilst on their own streets, which they themselves are bound to repair, and upon which they have no greater ease of passage than they would have if the trustees

1832.

POPE

v.

LANGWORTHY.

had never been created, the townspeople are under an inchoate liability to pay tolls to the trustees. If a party pass only two yards upon the road which is repaired by the trustees, they have no right to inquire whether he has not travelled a greater distance along other roads. *Major v. Oxenham* (a) shews that the Court will construe the exempting clause liberally for the passenger. *Bussey v. Storey* is distinguishable from the present case. The act is passed for the purpose of repairing and improving the road, and the trustees are forbidden to improve the spot in question. Every means is taken in the act to prevent the trustees from having any controul over this part of the road, or from taking toll in respect of it. The only part of the act which is in favour of the plaintiff is that which gives the title of the road.

DENMAN, C. J.—The exemption is not in sufficiently strong terms to exempt those passing along more than 100 yards of the road, although the part to be repaired by the trustees does not amount to 100 yards. The case of *Bussey v. Storey* is conclusive here.

LITLEDALE, J.—I entirely concur with what has been urged, that a party should have some of the road, and also that the road should be the road repaired by the trustees out of the tolls taken from it. The trustees are prohibited from repairing a particular part, but I do not think this portion is less to be considered as a part of the road which the trustees are liable to repair.

PARKE, J.—It is not possible to distinguish this case from the case of *Bussey v. Storey*, which was decided by me with the assent of my brothers, with the exception of my brother *Patteson*, who took no part in it. A party must pass 100 yards along the road. The question then is, what is *the road*? The whole distance is within the jurisdiction of the trustees, although they are prohibited from repairing the part between the School-house Porch and the Chard-Arms Hotel. It is still sufficiently within their jurisdiction to form part of the road. The liability of the townspeople to repair is nothing more than their ancient liability. They would of old have been obliged to repair the streets of the town. At present this is the way in which they are made to contribute their share to the expense of that which is a public benefit.

PATTESON, J.—It is impossible to distinguish this case from *Bussey v. Storey*. I gave no opinion in that case. I differed from the rest of the Court. I had been counsel in the cause, and had convinced myself that tolls ought not to have been demanded under the circumstances. Now I think I was wrong. This is a part of the road contemplated by the act, and may well be included as part of the 100 yards.

Postea to the plaintiff.

(a) 5 Taunt. 340.

1832.

The KING v. The Inhabitants of LEEDS (a).

The 24th section of 33 G. 3, c. 54, operates to prevent a person from gaining a settlement by apprenticeship, in a parish in which the master at the time of the binding resided under a certificate, although the master's disability is subsequently removed, and there is a sufficient service and residence afterwards in the parish.

ON appeal against an order of two justices removing *Nathaniel Bowles* and his family from the township of Leeds to the township of Horton, both in the West Riding of Yorkshire, the sessions confirmed the order, subject to the opinion of this Court upon the following case :

The respondents proved a settlement gained by the pauper's father in Leeds. The appellants then proved, that by an indenture bearing date in April 1809, *Nathaniel Bowles*, the pauper (when about thirteen years of age), was bound apprentice for seven years by his father to *Joseph Fox*, who was then residing at Horton, under a certificate from a friendly society. In 1813, *Fox* took a farm for a year in Horton at 40*l.*, which he occupied for the year. The pauper continued to serve his master in Horton from the date of the indenture for seven years. The Court being of opinion that the pauper had not gained a settlement by such apprenticeship, confirmed the order.

Blackburne and *Milner* in support of the order of sessions. This case turns upon the construction which the Court will put upon the 24th section of the Friendly Society Act, 33 Geo. 3, c. 54. If the master is, at the time of binding, not qualified to communicate a settlement from being a certificated person, the apprentice cannot gain a settlement. The act of 3 W. & M. c. 11, requires a *binding* as well as an *inhabiting* to confer a settlement by apprenticeship; and it has been decided that where the *binding* is made under circumstances which would at the time preclude the apprentice from gaining a settlement, by service under the master, he does not gain a settlement, although there be afterwards such a change of circumstances as

(a) This case was argued and decided in Michaelmas term 1832.

makes the *inhabitaney* sufficient; *Rex v. Hinckley* (a), *Rex v. Manningtree* (b). *Rex v. Nacton* (c) is no authority to the contrary, for there the master was qualified to communicate a settlement, never having in fact resided under the certificate.

1839:
The King
v.
Inhabitants of
Lezard.

Sir G. A. Lewin and Baines contra. If the apprentice had been included in the certificate, as in *Rex v. Manningtree*, there might have been ground for contending under the provisions of 9 & 10 W. 3, c. 11 (d), that he did not gain a settlement. But in 33 Geo. 3, c. 54, s. 24, which applies to the apprentices, servants, &c. of a certificated person, there is no enactment corresponding with that of 9 & 10 W. 3, c. 11. In *Rex v. St. Peter's, Derby* (e), it was held, that an apprentice bound to a master who was then residing in the parish of A. under a certificate from the overseers of B. gained a settlement by a service of forty days in A. after the certificate of the master had been discharged. *Rex v. St. Maurice in Winchester* (f), *Ivinghoe v. Stonebridge* (g), *Rex v. Nacton*.

Cur. ado. vult.

DENMAN, C. J., in Michaelmas term, 1832, delivered

(a) 4 T.R. 571.

(b) 6 Maule & Selw. 214.

(c) 3 Barn. & Adol. 543.

(d) Which enacts "That no person who shall come into any parish by any certificate from another parish, acknowledging him to be settled in such other parish, shall be adjudged by any act whatsoever to have procured a legal settlement in such parish, unless he shall really and bona fide take a lease of a tenement of the value of 10*l.*, or shall execute some annual office in such parish, being legally placed in such office."

The exception in 9 & 10 W. 3,

c. 11, in favour of those certificated persons who "shall really and bona fide take a lease of a tenement of the value of 10*l.*," has been held to extend to certificated persons residing on their own estates, which had come to them by act and operation of law, (*Burclear v. Eastwoodhay*, 1 Stra. 263,) or upon estates in the certificated parish which they had acquired by purchase, (*Rex v. Doddington*, Burr. S. C. 220).

(e) 1 T. R. 218.

(f) Burr. S. C. 27.

(g) 1 Stra. 265.

1832.
The KING
v.
Inhabitants of
LEEDS.

the judgment of the Court. The question in this case was, whether a pauper had gained a settlement in the parish of Horton. The pauper was bound apprentice to a master, who was at that time residing at Horton under a certificate from a friendly society; but before the term of apprenticeship expired, the master gained a settlement in Horton by renting a tenement; and the pauper served him, under the indenture of apprenticeship, more than forty days after that time. The question turns upon the proper construction of the 33 Geo. 3, c. 54, s. 24, by which it is enacted, that no person who shall be an apprentice, bound by indenture to—any person who did come into, or shall reside in any parish, township, or place, under the authority of this act, and not afterwards having gained a legal settlement in such parish, township, or place, shall gain or be adjudged to have any settlement in such parish, township, or place, by reason of such apprenticeship or binding; but all such apprentices—shall have their settlements in such parish, township, or place, as if they had not been bound to such person as aforesaid, any act or acts of parliament to the contrary notwithstanding." These words are copied nearly verbatim from 12 Ann. st. 1, c. 18, s. 2, which received a judicial construction in *Rex v. Hinckley (a)*, by which case we think we are bound. That case differs from the present in one circumstance only, viz. that there, the pauper having been bound to a certificated man, was afterwards assigned to another person, in the same parish, who was under no disability; whereas here, the pauper continued with the original master after his certificate was discharged. But the reasons given by Lord *Kenyon* in delivering the judgment of the Court, which was evidently much considered, apply to the present case as much as to that, and we cannot decide in this case that the pauper gained a settlement without overruling *Rex v. Hinckley*. The words of the statute are plain, that an apprentice bound to

a man who did come into, or shall reside in a parish under a certificate, and not afterwards having gained a settlement, shall not by such apprenticeship or binding gain a settlement in that parish, but shall be as if he had not been bound. Now the words "not afterwards having gained a settlement," are, grammatically, to be referred to the preceding words, "come into or reside," and manifestly point to the situation of the master at the time of the binding. If the master be residing under the certificate at the time of the binding, no settlement can by possibility be acquired by the apprentice in the certificated parish, notwithstanding a subsequent removal of the master's disability, but it is otherwise if the binding is after the discharge of the certificate where the master has gained a settlement in the certificated parish. Lord *Kenyon* says, it is necessary that the binding should be such as would be capable of conferring a settlement by service under the original master in that place, otherwise no settlement can be gained there by virtue thereof; for the legislature intended that no act whatsoever of this sort done by a certificated man should help to bind the parish. Here, according to this opinion, the binding was not, at the time it took place, such as would be capable of conferring a settlement; nor could any subsequent circumstances make the binding more efficacious, whatever effect they might have on the service; the consequence is, that the pauper remained as if he had not been bound, and gained no settlement in Horton. The case of *Ivinghoe v. Stonebridge* (a) was pressed in argument, but in that case the service expired before the passing of the statute of *Anne*, and besides the original binding was not to a certificated person, and was free from all objection. The case of *Rex v. St. Peter's, Derby* (b) was also pressed. It is sufficient to say, that in that case the present question was not presented to the Court, but it was decided, without argument, on the sole point whether one certificate was discharged

1832.

The KING
v.
Inhabitants of
LEEDS.

(a) 1 Stra. 265.

(b) 1 T. R. 218.

1832.

 The KING
 v.
 Inhabitants of
 LEEDS.

by the granting of another. That case was also prior to *Rex v. Hinckley* (a). Neither does our opinion militate against the case of *Rex v. Nacton* (b), decided in Easter term last; for that case proceeded entirely on the ground that the master never did reside under the certificate, but came into the parish in a condition to obtain a settlement. Upon the whole we are of opinion that the case of *Rex v. Hinckley* must govern the present decision, and that the order of sessions must be affirmed.

Order of Sessions affirmed.

(a) 4 T. R. 371.

(b) 3 Barn. & Adol. 548.

—◆—
 DUE, on the demise of JOHN JONES and others,
 v. DAVIES.

A. devises to B. and his heirs, "But to permit my daughter C. not only to receive the rents and profits to her own use, or to sell or mortgage any part thereof, but also to settle on any husband she may take, subject to his being liable to impeachment for waste or non-residence, or neglecting necessary repairs; but should my daughter have a child, I devise it to the use of such child from and after my daughter's decease, with maintenance in the meantime;" with remainders over, "should none of these cases happen;" adding, that he did not wish to restrain his daughter as a tenant for life, but that in case of misconduct amongst the remainder-men, she might, in a certain mode, set aside such remainder-men by her will:—Held, that C. took an estate tail.

EJECTMENT. At the trial at the Cardiganshire spring assizes, 1831, a special verdict was found to the following effect.

Nov. 2, 1793.—By his will, of this date, *Henry Jones*, being seised in fee of messuages and lands in the county of Cardigan, and being in the possession and receipt of rents and profits of certain other lands, in the parish of Nevern, under an agreement to purchase in fee, after stating that by strict care and economy he had been enabled to pay off debts contracted in early life, and saying "should my daughter die unmarried, I would not have the small estate I have been at the pains of improving and enlarging, to be sold or frittered away after her decease, or left to anybody who would be above residing upon it, but that it should

be entailed, and the residence of the several remainders in turn he made the absolute groundwork of such entail, imminent business and common and neighbourly visits excepted"—devised to *W. L., T. L. and L. G., Esqrs.*, and their heirs, all his real estates, but to permit, nevertheless, his daughter, *Susannah Maria Jones*, not only to receive the rents and profits thereof to her own use, or to sell or mortgage any part thereof if occasion required, but also to settle, on any husband she might take, the same or any part thereof for life, should he survive her (subject to impeachment for waste or non-residence, or neglect to repair): but should his daughter have a child, he devised it to the use of such child from and after his daughter's decease, with a reasonable maintenance for the education of such child in the meantime. Should none of these cases happen, he devised his real estates, from and after his said daughter's decease, unto the said *W. L., T. L. and L. G.*, and their heirs, in trust to preserve contingent remainders for the use of his nephew *John Jones* (the lessor of the plaintiff), if he should be at full age at his daughter's decease and comply with such residence and keeping in repairs, or should give the testator's trustees security for so doing when he arrived at that age, and supporting a family and servants on the premises in the meantime; and to the first and every other son of the said *John Jones*. And in default of such residence &c., he gave a similar estate to the eldest son of *D. J. Edwards*, on condition of residence and change of name;—similar remainders over successively to *Alban Thomas Clark* and *Alban Jones*, upon similar conditions;—remainder to the testator's right heirs for ever. The testator then stated that his object in having the premises occupied was the improving the neighbourhood, protecting the parish, and supporting its poor; and added, "This, I am persuaded, is my daughter's wish as well as my own, whom I by no means will to restrain as a tenant for life; but in case that either of the remainder-men should illtreat her, or be likely to turn out an immoral man or a bad member of

1832.

Doe
v.
Davies.

1832.

 DOE
 v.
 DAVIES.

society, she may, by the advice and consent of the trustees, set aside such a one by her own will and testament, that my intention of doing good to the neighbourhood, may not be defeated. I recommend it to my daughter, for want of issue to herself, not to leave in legacies above 500*l.* or 600*l.*, and that out of my charge on Nevern, which I have also articulated for, and entail the rest for the further support of this house." The testator then bequeathed sums of money, in charity and to servants and others, and constituted his daughter executrix and residuary legatee.

29th April, 1794.—The testator died seised of the premises, in question, and in possession of the rents and profits of the lands in Nevern, and without having revoked or altered his will. Upon the death of her father, *Susannah Maria Jones* entered.

2d Sept., 34 Geo. 3, (1794).—At a court of great sessions, *Susannah Maria Jones* suffered a common recovery of the premises in question.

She afterwards married *Alban Thomas*, who took successively the surnames of *Jones* and *Gwynne*.

The possession was continued jointly in *Susannah Maria* and her husband during his life, and by her alone, after his decease, until her own death.

29d May, 1827.—The said *Susannah Maria Gwynne* having survived her husband, and being a widow, by her will, duly attested for passing real estates, by virtue and in pursuance and exercise of all powers and authorities in her vested or in anywise enabling her in that behalf, gave and devised, directed, limited, and appointed all her real estates unto *David Davies*: *habendum* to *David Davies*, his heirs and assigns, to the use of *Alban Thomas Davies* (being the defendant in this action), during his life: with divers remainders over.

17th Nov. 1830.—*Susannah Maria Gwynne* died a widow, without having revoked or altered the parts of her will above set out, and without ever having had any issue.

At the time of the death of *S. M. Gwynne*, the lessor of

the plaintiff, *John Jones* (to whom a remainder was given in the will of *Henry Jones*) and two others, were co-heirs of *Henry Jones* and *Susannah Maria Gwynne*.

None of the three trustees, all of whom died before Mrs. *Gwynne*, ever joined or concurred in making a tenant to the præcipe for suffering any recovery of the premises in question.

Immediately after the death of Mrs. *Gwynne*, a formal entry was made upon the premises above-mentioned by the lessor of the plaintiff, *John Jones*, to avoid (a) all fines and recoveries.

E. V. Williams, for the plaintiff (b): Looking at the whole of this will, it is evident that the testator meant to give an estate for life to his daughter, and it contains no technical words inconsistent with such an intention: *Jesson v. Doe* d. *Wright* (c). The word "child" creates no difficulty, if taken in its ordinary sense, as designating an unascertained individual, instead of treating it, as the defendant will seek to do, as nomen collectivum. To support the latter construction, it should be shewn that the ordinary signification of the term is controlled either by technical words which cannot be got over, or by a plain intention apparent on the face of the will: *Robinson v. Robinson* (d), *Mellish v. Mellish* (e), *Ginger v. White* (f). If, however, it is considered that in addition to the life estate a remainder in tail was created by the limitation to the "child" of the daughter, it is submitted that such remainder would not coalesce with the life estate (g), inasmuch as the two estates were not of

1832.
DOE
v.
DAVIES.

First point:
The word
"child," as
designating an
individual or
a class.

Second point:
Legal or equitable remain-
der.

(a) These precise words were unnecessary, an entry to avoid a fine being sufficient if declared to be made *animo clamandi*; *post*, vol. ii. 602, *Doe v. Williams*.

(b) This case was argued in Trinity Term, 1832.

(c) 2 Bligh, 1, 51.

(d) 1 Burr. 38.

(e) 3 Dowl. & Ryl. 804; 2

Barn. & Cressw. 520.

(f) Willes, 348.

(g) Under the rule in *Shelley's* case, (1 Co. Rep. 93,) wherever an estate of freehold is devised or conveyed to A., and by the same gift, or will, deed, or other instrument, a remainder is limited immediately or remotely (i. e. either with or without the interposition of some

1832.

DOE
v.
DAVIES.

the same quality. The provisions for the receipt of the rents and profits by the daughter, for making a settlement on a husband, and for maintenances of children during her life estate, require that the legal estate should remain in the trustees. The life estate was therefore equitable; the remainder, legal,

First point.

Wilson, contra. Where the will manifests an intention that the remainders over shall not take effect until failure of issue, the word "child" indicates a class; *Milliner v. Robinson* (a), *King v. Melling* (b), *Wyld v. Lewis* (c), *Raggett v. Beatty* (d), *Broadhurst v. Morris* (e). So, "son;" *Robinson v. Robinson* (f), *Mellish v. Mellish* (g).

Second point.

The daughter took an immediate legal estate. A devise to A. in trust to permit B. to receive the rents and profits, vests the legal estate in B.: *Right d. Phillipps v. Smith* (h), *Doe v. Biggs* (i). The power of making an appointment in favour of a husband does not require a continuing seisin in

other limitation), to the heirs of A., either general or special, though such remainder be created by words distinctly importing an independent gift to the heirs as original takers, the estate of inheritance vests absolutely and exclusively in A., and the heirs take nothing. As soon as simultaneous limitations, of an estate of freehold to the ancestor, and of a remainder to the heirs, have, by the ordinary rules of construction, been ascertained to exist, the second limitation ought to be read as a limitation of an estate of inheritance to the ancestor himself.

As instruments are to be stated in pleading according to their legal effect, that which purports to be a limitation to A. for life, followed by a remainder to the right heirs of A., should be treated as one simple limitation in fee, and should be pleaded as a conveyance to A. and

his heirs; (*post*, 661, n.) Where the limitation is expressed to be to A. for life, remainder to B. for life (or to B. and the heirs of his body), remainder to the right heirs of A., the statement on the record should be, of a limitation to A. for life, remainder to B. for life (or to B. and the heirs of his body), remainder to A. and his heirs. *Vide* plead'gs in *Morris v. Dimes*, *post*, vol. iii. And see this rule explained in *Hayes on Conveyancing and the New Statutes*, Appendix, 92. See also *Hood v. Pym*, Exch. E. T. 1834.

(a) Sir Fras. Moore, 682.

(b) 1 Ventris, 231.

(c) 1 Atk. 433.

(d) 5 Bingh. 243; 2 M. & P. 512.

(e) 2 Barn. & Adol. 1.

(f) 1 Burr. 38.

(g) 3 Dowl. & Ryl. 804; 2 Barn. & Cressw. 520.

(h) 12 East, 455.

(i) 2 Taunt. 109.

the trustees; nor, the power of appointing a maintenance to children. Indeed, if the maintenance clause required that the trustees should continue seised, their seisin must be in fee, and not for the life of the daughter, as the necessity for maintenance might continue after her death.

It was the intention of the testator that his daughter should have full dominion over the property. He says that he does not mean "to restrain her as a tenant for life," but that "for want of issue to herself she should not leave in legacies above 500*l.* or 600*l.*, and that out of my charge on *Nevern*, which I have articked for, and entail the rest for the further support of this house." This could be effected only by her suffering a recovery or executing an appointment. On the former supposition the recovery is well suffered; on the latter, the power of appointment is well executed by her will.

The power which this construction gives to the daughter, of defeating some of the testator's intentions by suffering a recovery, is a mere legal consequence of the efficacy given by the Courts to such assurances, whereby in all cases the provision of the statute *de donis*,—that the will of the donor be observed,—is allowed to be eluded (*a*).

Williams, in reply. In the cases which have been referred to by the defendant an estate tail was necessarily created, by words of inheritance controlling the general intent. Without a legal estate subsisting in the trustees, the condition of residence could not have been enforced. [*Parks*, J. The same observation would apply to the remainder limited to the lessor of the plaintiff.]

PABKE, J. in Michaelmas term, 1832, delivered the judgment of the Court.

The questions discussed in this case arise on the First point. will of *Henry Jones*; and the one on which the argument has principally been is, what estate did *Susannah Maria* take; it being contended on the part of the plaintiff that

(a) Third Report of Common Law Commissioners, App. 68.

1832.
 ~~~~~  
 DOX  
 v.  
 DAVIES.

she took only for life, and that consequently the recovery was bad,—on the other side, for the defendant, that she took an estate in tail. The will appears to have been drawn by the testator himself; and is one of those unfortunate instances of a party wishing to tie up his estate with limitations and upon contingencies, without knowing what language to use for the purpose. The construction must be according to the plain and manifest intent of the testator; and although no words of limitation are annexed to the devise in favour of the daughter, yet if the paramount intent cannot be satisfied without her taking an estate tail, and the language of the will will justify it, such must be the construction. And upon the best consideration, we are of opinion that she took an estate tail. First, with respect to the intent. The testator says, that if his daughter should die unmarried, he would not have his small estate sold or frittered away after her decease, or left to any body who would be above reaiding on it, but that it should be entailed, &c. Now, upon this a very strong inference arises, that the issue of the daughter, if she married, were within his view, for he contemplates the possibility of the estate going over to the remainder-man in the event only of his daughter's dying unmarried. And this is made the foundation of the subsequent devise, for he goes on—"I therefore give, devise and bequeath unto W. L. &c. all my real estate, but to permit my daughter not only to receive the rents and profits to her own use, or to sell or mortgage any part, if occasion require, but to settle on any husband she may take, the same or any part thereof, should he survive her," but on certain conditions. Then he goes on—"but should my daughter have a child, I leave it to the use of such child from and after my daughter's decease, with a reasonable maintenance, &c. Should none of these cases happen, I give and devise my said real estate, from and after my daughter's decease, to the trustees and their heirs, to the use of John Jones, on certain conditions, and to the first and every other son of John Jones." Now here the

1832.

DOE  
v.  
DAVIES.

limitation over to the use of *John Jones* was only if none of those cases should happen, of which the principal was his daughter's leaving a child at the time of her death; which is equivalent to saying—"if my daughter shall die leaving no child," and shews an intent that the estate should only go over on failure of issue of the daughter; otherwise, if the daughter had had a child, and that child had died in her lifetime leaving issue, the estate would have gone over. This brings us to the consideration whether the words will warrant the construction of the daughter's taking an estate tail. At the time of making the will and at the testator's death, the daughter was unmarried and had no child. We think then that the word "child" was not a designatio personarum, but comprehended a class; and that this case is like *Bigfeld's* (a),—devise to A., and if he die, not having a son, then to remain to the heirs of the testator. "Son" was there taken to be used as nomen collectivum, and held an entail. Other cases to the same effect were cited in the argument.

Another question was raised in favour of the plaintiff,—Second point. that the recovery was insufficient in consequence of the estates not being of the same quality. But we think that there is no reason for making any distinction of this sort, and that the interest, vested in the daughter of the testator, was throughout of the same quality (b).

Being of opinion, therefore, that the daughter was seized of an estate tail, we think that the recovery was good.

Posted to the defendant.

(a) Cited by Lord Hild in *King v. Melling*, 1 Ventris, 284. *M. Jones herself*, and the heirs of her body, unto (b) her by a

(b) The two estates would therefore coalesce; not (as has been sometimes supposed), by the mere operation of the rule in *Shelley's* case, (that rule being satisfied by reading the devise to the child of *S. M. Jones* as a limitation to *S.* common law, neither, in this estate tail, of the preceding life estate. Where, by reason of the interposition of a limitation to a stranger there can be no merger, a coalition does not take place. 2 Mann. & Ryl. 490 (c).



1832.

## REX v. THOMAS ANDREWS ADAMES.

In rating to the poor, land liable to sewers-rate, the amount of such rate must be deducted from the valuation.

**THIS** was an appeal against a rate for the relief of the poor of the parish of Pagham, Sussex, upon the defendant, in respect of certain lands lying in Pagham Level, which were rated as being of the yearly value of 312*l.* 14*s.* 5*d.* The Court of Quarter Sessions respited the appeal, and appointed three persons to survey and value the parish. The land occupied by the defendant was valued by them at 306*l.* per annum. At the following sessions the valuers produced their valuation, and stated that they had valued the lands in the amounts for which they considered that they would let; that for the lands in Pagham Level, (which, unless protected by embankments, were liable to be flooded by the sea), an occasional sewers-rate was payable, but that in estimating the value of these lands they had made no deductions on account of the sewers-rates. It was stated in evidence by the valuers that the sewers-rate was universally considered to be a landlord's tax, and that they had never been called upon to make any deductions on account of it. The Court of Quarter Sessions confirmed the rate, subject to the opinion of this Court upon the question whether or not the sewers-rate, paid by the defendant, ought to have been deducted by the valuers in estimating the yearly value of the land occupied by him.

*Capron*, in support of the order of sessions(a). The poor-rate being always calculated upon the rent *bonâ fide* paid by the tenant, is considered as an *occupation rate*, whereas the sewers-rate is a *landlord's tax*, and resembles the land tax and other taxes which are burthens upon the landlord, and are never deducted. Though this tax may decrease the value of the land to the owner, it does not

(a) This case was argued in *Tenterden, C. J., Littledale, Parkes*, Easter term 1832, before Lord and *Patteson, JJ.*

lessen the profit of the occupier, who is the person assessed for the poor-rate. So he would be if the *land-tax* were unredeemed, yet it was never proposed to deduct the amount of the land-tax. Outlays of capital are required upon some land in draining, and in other improvements, for which interest is paid in the shape of additional rent, yet a tenant could not claim a deduction on this ground. The occupier ought to be assessed to the poor-rate, according to the value of his occupation. The land must be rated according to its productive value, without any reference to the charges upon it, which may lessen its actual value to the landlord,

1832.  
  
 The KING  
 v.  
 ADAMES.

*Long*, and *W. H. Scott*, contra. The rent which a tenant pays for the land is not always the proper criterion of the value of the occupation. It may generally be convenient to adopt this as the criterion, but it is not correct. Where in settling the rent allowance is made for all the taxes which the tenant may be called upon to pay, then the rent would be a fair criterion of the annual value of the occupation. *Parke, J.* It is not material whether the landlord or the tenant pays the rate; in either case it diminishes the annual profit of the land.] That which should form the subject of the rate is the profit which the landlord receives from the land. Here, as the landlord pays the sewers-rate, it cannot be said that his profit is equal to the rent. The landlord's profit is the value of the products of the land diminished by all the expenses attending the cultivation in whatever shape, and the burthens imposed on the land in the shape of rates and taxes. *Rex v. Lord Granville(a)*, *Rex v. Lower Mitton(b)*, *Rex v. Tomlinson(c)*, *Rex v. The Oxford Canal Company(d)*, *Rex v. Joddrell(e)*. This is precisely the same case as if in discharge of the

(a) 4 Mann. & Ryl. 174; 9 Barn. & Cressw. 188.

(c) 4 Mann. & Ryl. 169; 9 Barn. & Cressw. 163.

(b) 4 Mann. & Ryl. 711; 9 Barn. & Cressw. 810.

(d) 10 Barn. & Cressw. 163.

(e) 1 Barn. & Adol. 403.

1832.  
 The KING  
 v.  
 ADAMES.

various burthens, and particularly here the expense of preserving the lands from destructive floods; a portion of the land itself had been given up.

PARKE, J. in *Michaellmas Term, 1832*, delivered the judgment of the Court (a).

The question for the opinion of the Court in this case is, in effect, whether the occupier of lands in a district of the parish of Pagham, which is liable to be flooded, and is protected from floods at a certain occasional expense (for that is the nature of the sewers-rate), ought to be rated at the same sum as the occupier of lands of similar quality and of equal annual produce, lying in the same parish, but not liable to the same expense. We are of opinion that he ought not. It is obvious that the average annual net profit of one description of land is not the same as that of the other; and both upon principle and authority we think the rate ought to be made in proportion to *that* profit. The statute 43 *Eliz. c. 2*, requires the churchwardens and overseers to raise competent sums by the taxation of every occupier of lands according to the *ability* of the parish. Nothing is expressly said as to the principle upon which the rate should be made, but it is implied that it must be made with equality, and with some reference to the subject of occupation. Now it is quite clear it ought not to be made according to the profit derived by the occupier himself; for if that were so, the rates must vary according to the nature of the occupier's interest. An occupier who is tenant at will at rackrent, and therefore receives a less share of the annual profit of the land than one who is tenant for years at a small rent, and still less than one who is a tenant in fee simple and pays none at all, would be ratable at a less sum;—a proposition which was never yet contended for. Again, it is quite clear that though the occupier is the person who nominally pays the tax, it is in reality paid by the

(a) *Littleale, Parke, and Patteson, JJ.*, Lord Tenterden, C. J., having died in the interim.

beneficial owner, and is a charge upon the land. In proportion as the average tax which the tenant has to pay is greater, in the same proportion will he give less rent to the owner. Ultimately, in the long run, this will always be the case; though when the tenancy is for a term more or less long, the burthen upon the landlord is postponed for a greater or less period. This being so, it follows, that in order to make an equal rate, the nature of the occupier's interest must be disregarded, and the rate imposed according to some value of the subject of occupation.

Usage and convenience have established this value to be, not that of the estate or property itself, but that of the profit which is or might be made from the estate or property. And as it would be very difficult and extremely troublesome to ascertain the precise value of that profit, during the time for which each rate is made, and in cases of occasional profit, both troublesome and unjust, (*Rex v. Mirfield(a)*, *Rex v. Hull Dock Company(b)*), to make a rate for a large sum at one time, and a small one or none at another, upon the same land, the rule has been to assess according to the annual profit of the land; or where the produce is not matured in one year, then upon an average of years; from which profit deductions are allowed for all the expenses necessary to its production. It is not material whether the whole or a certain aliquot part of that net profit is rated, provided all lands of the same description be rated equally upon the whole, or upon that aliquot proportion, of the profit; and in practice it is usual (and it is most convenient) to rate lands at the rack rent which they would pay to a landlord, or some certain portion of it, the tenant paying all rates, charges, and outgoings; which is, in effect, rating according to a part of the net profit only; but provided it be the same aliquot part in all cases, it makes no difference. Further, if the subject of occupation be of a perishable nature, or require an annual expense to secure its existence, an allowance ought to be made on that account; for the total annual

1832.  
The KING  
v.  
ADAMES.

(a) 10 East, 219.

(b) 5 Maule & Selw. 394.

1832.

The KING  
v.  
ADAMES.

profit is not the *net* annual profit; a part must be set aside for the restoration and maintenance of the subject of occupation. It is on this principle that buildings have been permitted to be rated at less in proportion than arable and other land. The cases, especially those of a more recent date, in which the principle of rating has been more fully discussed and considered, will be found to have established this rule of rating, which is, in other words, that all lands are to be assessed in proportion to the net rent which a tenant at rack rent would pay, he discharging all rates, charges, and outgoings. It may be sufficient to refer to the following authorities in support of this position: *Rex v. The Birmingham Gas Light and Coke Company* (a), *Rex v. Hull Dock Company* (b), *Rex v. Attwood* (c), *Rex v. Trustees of the Duke of Bridgewater* (d), *Rex v. Tomlinson* (e), *Rex v. Lower Mitton* (f), *Rex v. The Oxford Canal Company* (g), *Rex v. Joddrell* (h). It remains only to apply the principle to the present case; and there can be no difficulty in saying, that land which requires some occasional expenditure to preserve it from being damaged by water, and to make it as productive as it is, would let for less rent than similar land which requires none, the tenant defraying, amongst others, that occasional expenditure. In other words, the net average annual profit of both is not the same, and consequently the rate ought not to be the same. In the course of the argument a question was asked, whether land, of which the land-tax is redeemed, ought to be rated higher than land of the same quality, which is still chargeable with the tax. The answer is, that it ought not; the annual net profit of both is the same, though such annual profit in the latter case is liable to a tax, from which it is by law exempted in the former. The rate in the present case must therefore be amended. I must add, that this is the judgment of myself

Land-tax.

(a) 1 B. &amp; C. 506; 2 D. &amp; R. 735.

(b) 3 B. &amp; C. 516; 5 D. &amp; R. 359.

(c) 6 B. &amp; C. 277; 9 D. &amp; R. 328.

(d) 9 B. &amp; C. 68; 4 M. &amp; R. 148.

(e) 9 B. &amp; C. 163; 4 M. &amp; R. 169.

(f) Ibid. 810; 4 M. &amp; R. 711.

(g) 10 B. &amp; C. 163; 5 M. &amp; R. 100.

(h) 1 Barn. &amp; Adol. 403.

and my brothers *Littledale* and *Patteson*, who heard the argument; Lord *Tenterden* was of a different opinion.

1832.  
The KING  
v.  
ADAMES.

TAUNTON, J. then said, that he concurred in the judgment delivered.

ROOTS v. Lord DORMER.

CASE, for a second distress upon growing crops, purchased by the plaintiff under a former distress upon the same tenant. At the trial before *Gaselee*, J., at the Bucks summer assizes, 1832, it appeared that the plaintiff, at a sale under the former distress, had purchased four lots under certain written conditions. The aggregate purchase-money was 38*l.*, but no one lot was sold for as much as 20*l.* And on the same day the plaintiff and others signed the following agreement, written at the foot of the conditions of sale, and unstamped:

"We do hereby consent and agree to become the purchasers of the lot or lots specified in the annexed catalogue of sale, set against our names respectively, according to the terms mentioned in the foregoing conditions. Witness our hands this 8th day of March, 1830.

(Signed) *W. Roots*. Lots 57, 59, 60, 66." With other signatures. Verdict for the plaintiff.

Where upon a sale by auction of growing crops, *A.* purchases several lots for prices respectively under 20*l.*, but amounting in the aggregate to 38*l.*, the sales to *A.* may be proved by one unstamped memorandum, signed by *A.* and others, purporting that they agree to purchase the lots respectively set against their signatures, under the terms of the conditions of sale.

*Storks*, Serjt. now moved for a new trial (a). This instrument is an agreement for the purchase of an interest in land of the value of more than 20*l.*, and was therefore not receivable in evidence without a stamp. It is true that the lots were separately knocked down to the plaintiff, at prices under 20*l.*, but there was no contract until the agreement was signed, and this was an agreement for the purchase of all. The written agreement was the only evidence of the contract.

(a) On the second day of Michaelmas term, 1832.

1832.

Roots  
v.  
Lord  
Dormer.

By the COURT (d).—No stamp was necessary in this case. There is a separate contract on each lot. Suppose a man had purchased several lots, and had signed this agreement, and afterwards had neglected to comply with the conditions of sale as to one lot, how would you have declared? Not upon the agreement as an entire contract for all the lots purchased. The agreement is separate as to the lots, and also as to the several parties to it.

Rule refused (d).

(a) *Parke, Taunton, and Pat-fiths*, 1 Esp. N.P.C. 150; *Hodgson v. Le Bret*, 1 Campb. 233; *James*

(b) Vide *Poole v. Shergold*, 2 v. *Shore*, 1 Stark. N. P. C. 426; Bro. C. C. 118, 1 Cox, 273, 6 Sugd. V. & P. 8th ed. Ves. 676, S. C.; *Chambers v. Grif-*

CROSSFIELD and another, Assignees of BROSTER,  
v. STANLEY (c).

A judgment on a warrant of attorney is not within the protection of 1 W. 4, c. 7, s. 7, and therefore is within the 108th section of 6 G. 4, c. 16.

In assumpsit for money had and received against the sheriff, to recover the proceeds of a sale under a fi. fa. issued upon a judgment not protected by 1 W. 4, c. 7, s. 7, the plaintiff

ASSUMPSIT for money had and received by the late sheriff of Cheshire to the use of the plaintiffs as assignees. At the trial before Lord Lyndhurst, C. B., at the Cheshire summer assizes, 1832, the following facts appeared:

9th April, 1831. *Broster* executed a warrant of attorney to *Stringer*.

6th February, 1832. *Stringer* signed judgment, and issued a testatum fi. fa.

9th Feb. The sheriff levied.

12th Feb. *Broster* committed an act of bankruptcy.

14th Feb. The sheriff commenced the sale.

15th Feb. The sale being nearly concluded, the sheriff received notice that *Broster* had committed an act of bankruptcy, and that a docket had been struck against him.

(c) This case was argued and determined at the commencement of Michaelmas term, 1832. was held liable, where notice of an act of bankruptcy committed before the sale, and of a docket struck thereon, was given to him when the sale was nearly completed, after which he received the proceeds and handed them over to the execution creditor.

The sale was concluded and the proceeds paid over to *Striager*; to recover which from the sheriff this action was brought. For the defendant it was contended that this execution was protected by the 7th section of 1 *Will.* 4, c. 7(a), and also that the sheriff not having received the notice until the sale was nearly completed, he was not liable. For the plaintiffs it was contended that the case fell within the 108th section of 6 *Geo.* 4, c. 16(b), and upon the other point the case of *Notley v. Buck*(c) was cited. The learned Chief Baron being of this opinion, directed the jury to find their verdict for the plaintiffs, (which they accordingly did,) but gave the defendant leave to move to enter a nonsuit.

1832.

CROSSFIELD  
v.  
STANLEY.

*Jones*, Serjt. now moved accordingly. This question turns upon the meaning of 1 *Will.* 4, c. 7, s. 7. The intention of that act was to protect all judgments, as well those on warrants of attorney as those particularly named in the act, unless obtained by collusion for the purpose of fraudulent preference; and, therefore, as the plaintiff has not shewn that the warrant of attorney was a fraudulent preference, and the judgment upon it collusive, the case comes within the protection of the act. A second point is, whether the sheriff is liable in respect of sales made before he received notice of the bankruptcy. *Notley v. Buck* was cited at the trial to the contrary; but this case is different, because there the notice was given to the sheriff before any

First point:  
Protection of  
judgments by  
1 *W.* 4, c. 7,  
s. 7.

Second point:  
Liability of  
sheriff in re-  
spect of acts  
done before  
notice of  
bankruptcy.

(a) Which recites the 108th section of the 6 *Geo.* 4, c. 16, and enacts "that no judgment signed or execution issued, after the passing of this act, on a cognovit actionem, signed after declaration filed or delivered, or judgment by default, confession, or *nihil dicat*, according to the practice of the Court, in any action commenced adversely, and not by collusion for the purpose of fraudulent preference, shall be deemed or taken to be

within the said provisions of the said recited act." 1 *W.* 4, c. 7, s. 7.

(b) Which provides "that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nihil dicat*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid ratably with such creditors." 6 *G.* 4, c. 16, s. 108.

(c) 2 *Mann. & Ryl.* 68; *S. C.* 3 *Barn. & Cressw.* 160.



1832.

CROSSFIELD  
v.  
STANLEY.

sale had been made, whereas here the sale had continued for nearly two days before the notice was given. In *Balme v. Hutton* (a) it was held, that a sheriff, who under a writ of *fi. fa* seizes and sells goods of a bankrupt before commission, but after an act of bankruptcy, without notice of the act of the bankruptcy, is not liable in an action of trover (b) at the suit of the assignees.

PARKE, J. (c)—There is no difficulty in this case, when the two clauses are compared. This is a judgment upon a warrant of attorney, not a judgment on a *cognovit actionem* after declaration filed or delivered, nor by default, confession, or *nil dicit*, to which alone the enactment of 1 Will. 4, c. 7, s. 7, applies, and therefore it is not within the protection of that section. The defendant seeks to add words to the 108th section, which would limit its operation to those cases only where the judgment has been obtained by collusion, for the purpose of fraudulent preference. The proviso, I think, is general, and applies to this case. With regard to *Balme v. Hutton*, it is not necessary to embarrass ourselves with that at all. That was in trover; this is in assumpsit for money had and received; and the money was received by the sheriff after he had notice of the bankruptcy.

TAUNTON and PATTERSON, JJ. concurred.

Rule refused.

(a) 2 Crompt. & Jerv. 19; S. C. 2 Tyrwhitt, 17.

(b) This case has since been overruled in the Court of Exchequer Chamber, *vide* 1 Crompt. &

Moss. 262, 2 Tyrwhitt, 620., 9 Bingh. 471, 3 Moore & Scott, 1, S. C.

(c) Denman, C. J. had not at this time taken his seat on the bench.

1832,

STURCH v. CLARKE and others.

**CASE.** The declaration alleged that the defendant wrongfully and *maliciously* took and distrained certain cattle, goods and chattels of the plaintiff, for and in the name of a distress for 141l. 12s. 8d., pretended and alleged to have been duly rated and assessed upon the plaintiff for the relief of the poor of the parish of Hadenham, and to be in arrear and unpaid, and being of much greater value than 141l. 12s. 8d., to wit, of the value of 700l., and thereby took a great, unreasonable, and excessive distress for the said 141l. 12s. 8d.

At the trial before *Gaselee, J.*, at the last Buckingham assizes, it appeared that the defendants, of whom two were the overseers, and the other an auctioneer, under a warrant of distress in the common form, signed by two magistrates, seized, for poor-rates amounting to 141l. 12s. 8d., goods valued at 642l. For the defendants it was objected that a perusal and copy of the warrant should have been demanded, pursuant to 24 Geo. 2, c. 44, s. 6. The jury found a verdict for the plaintiff, damages 10l., and the learned judge gave the defendant leave to move to enter a nonsuit. In Michaelmas term, 1832,

In actions against overseers and constables, no demand of perusal and copy of warrant is necessary, if no action would have lain against the party issuing the warrant.

An action for an unreasonable and excessive distress, for poor-rates alleged and pretended to be due, is properly laid in case.

In such an action malice need not be proved.

*Biggs Andrews* moved for a rule to shew cause why a nonsuit should not be entered, or a new trial had, or why judgment should not be arrested.

Two of the defendants in this case acted as overseers, under a warrant from the magistrates. They were therefore entitled to the protection of 24 Geo. 2, c. 44, s. 6, and before an action could be maintained against them a demand of the warrant should have been made; *Nutting v. Jackson* (a), *Milward v. Caffin* (b). This is requisite even if the warrant be legal; *Harper v. Carr* (c), *Price v. Messen* er (d).

First point:  
Nonsuit.

(a) Bull. N. P. 24.

(b) 2 W. Bla. 1330.

(c) 7 T. R. 271.

(d) 2 Bos. & Pull. 158.

1832.

STURCH  
v.

CLARKE.

Second point:  
New trial.Third point:  
Arrest of judgment.

The learned judge did not leave it to the jury to consider whether malice had been proved. [Parke, J.] It is not necessary there should be malice; all that is requisite is, that the jury should be satisfied that more was taken than was reasonable (a).

The declaration alleges that the distress was made for money pretended and alleged to have been duly rated. It is not admitted that there was any rate for which the distress could be made, and if there was no legal right to distrain, the action should have been in trespass.

First point:

PARKE, J.(b).—This is an action for an excess in the execution of the warrant. The warrant contemplates the possibility of the officers taking a reasonable quantity of goods, which might be more than sufficient to satisfy the rates, and in that case directs the overplus to be paid to the party on whom the distress is made, but the allegation in the declaration is, that the defendants took an unreasonable distress. The words of the act are, that no action shall be brought for any thing done *in obedience to any warrant, not in pursuance of the warrant*. The act can never apply to a case where the justices could not be made parties; *Bell v. Oakley* (c). *Milton v. Green* (d), shews the distinction between the cases in which the magistrate may be joined as a wrong-doer, and those in which the warrant is regular, but the officer has exceeded the authority given by it.

Third point:

Whatever might have been the case upon demurrer, I think that the whole declaration does amount to a complaint against the defendant for an excessive distress; and in the present state of the proceedings it is sufficient.

First point:

TAUNTON, J.—I am of the same opinion. The words

(a) And see *Mitchell v. Jenkins*,  
post, vol. ii. 301.

(b) *Denman*, C. J. had not at  
this time taken his seat,

(c) 2 Maule & Selw. 259. And  
see *Cotton v. Kedwell*, post, vol. ii.  
399.

(d) 5 East, 238,

and "they thereby took a great, unreasonable, and excessive distress," imply that some rate was due.

1832.

STURCH.  
v.  
CLARKE.

PATKESON, J.—I am of the same opinion. The plaintiff might waive the trespass and declare in case; *Branscomb v. Bridges* (a). At all events I think, that after verdict this declaration may be considered as complaining of an excessive distress.

Rule refused.

(a) 2 Dowl. & Ry. 256; 1 Barn. & Cressw. 145.

GREEN and others v. MITTON, Gent. one &c.

CAMPBELL, S. G. had obtained a rule nisi to amend the bill, issue, and record in this case, by inserting a count in *detinue* in lieu of a count in *trover*, and by adding a count in *debt*. The affidavits filed by the plaintiffs stated, that the action was brought for the recovery of certain title deeds on which the plaintiffs had lent money, that the bill was drawn in *trover* by a special pleader, but the plaintiffs' attorney had lately been informed that it ought to be in *detinue*, and that the object of the parties was to recover the title deeds. It appeared from the defendant's statement that this action was commenced in Hilary term, 1831, that the plaintiffs were then aware of all the facts of the case, and that they had given a peremptory undertaking to go to trial after Easter term, 1832. This case was argued in Michaelmas term, 1832.

After a lapse of seven terms the Court refused to permit an amendment by altering a count in *trover* for title deeds, into a count in *detinue*, adding a count in *debt*.

Sir James Scarlett shewed cause, and cited *Levett v. Kibblewhite* (b).

Campbell, S. G. contra, submitted that justice would be

(b) 6 Taunt. 483.

x x

1832.

GREEN  
v.

MITTON.

done by granting the application, and that the defendant could not be prejudiced.

By the COURT (*b*).—Were we to grant this application and make the rule absolute, we should establish a very inconvenient precedent. The circumstances in *Levett v. Kibblewhite*, where assumpsit was changed into debt, were very different.

Rule discharged.

(a) *Dennan, C. J., Parke, Taunton, and Paterson, JJ.*

HUTCHINSON v. LOWNDES, HALL, RADFORD, and  
BROAD.

Where power is given a magistrate to commit by issuing forth their warrant, (as under 5 Geo. 4, c. 18, s. 2,) such warrant must be in writing; and an imprisonment without a warrant, except during the period necessary to prepare the warrant, is illegal.

The irregularity is not cured by a warrant of commitment drawn up on a subsequent day, dated as of the day of the commitment.

**ASSAULT** and false imprisonment. Plea: not guilty. At the trial at the Cheshire summer assizes, 1832, before Lord *Lyndhurst*, C. B. the following facts appeared:

23d May, 1831. *John Cotterill*, a labourer, applied to the defendant *Hall* to summon the plaintiff for 1*l.* 4*s.* 6*d.* alleged to be due to him for a week's wages for work done in Congleton. *Hall* granted a summons requiring the plaintiff to appear the same day before the justices of the borough of Congleton. The plaintiff appeared, in obedience to the summons, before the defendants *Lowndes* and *Hall*, two of the borough justices, when *Cotterill* swore to the truth of his complaint. The plaintiff stated, that he acted as agent and not as principal: the complainant said he knew no other person in the transaction. *Lowndes*, (who was mayor of Congleton) ordered the plaintiff to pay 1*l.* 4*s.* 6*d.* and 2*s.* 6*d.* for the summons, &c., which the plaintiff refused to do. He was then asked if he had any goods within the borough upon which the money might be levied, and upon his answering that he had none, was at once by a verbal order committed to the borough gaol for one month, unless he should sooner pay the wages and costs. This order was executed by the defendants *Radford* and *Broad*,

constable and gaoler of the borough, and the plaintiff continued in the gaol from the evening of the 23d of May, until the 26th of the same month, upon which day the wages and costs were paid.

31st May, 1831. *Lowndes* was served with a notice of action; and a copy of the warrant of commitment was demanded of the constables. At this time there was no warrant of commitment in writing, but such a warrant dated 23d May was subsequently made out and signed by *Lowndes*, a copy of which was delivered to the plaintiff on the 4th June.

It was argued at the trial that the commitment *without a warrant in writing*, was illegal; and the learned chief baron being of that opinion, directed the jury to return a verdict for the plaintiff, with leave to the defendants to move for a nonsuit upon this point.

*Cottingham* now moved accordingly (a). The magistrates had jurisdiction in this case to order the payment of the wages and costs, and under the 5 Geo. 4, c. 18, s. 2, they were, upon the confession of the party that he had no goods within the jurisdiction upon which the wages and costs could be levied, empowered to commit to gaol (b). [*Parke, J.* There must be a warrant in writing.] It does not appear to be necessary that the warrant should be made out previously to the commitment to prison; it is sufficient if it be made out within a reasonable time afterwards. A conviction need not be drawn up at the time of the actual conviction. *Massey v. Johnson* (c), *Gray v. Cookson* (d), *Basten v. Culeio* (e). If the jurisdiction of the Court be clear, the making out of the warrant in writing is only matter of form (f).

(a) In Michaelmas term, 1832. (c) 12 East, 67.  
 (b) See *Brantell v. Penneck*, (d) 16 East, 13.  
 11 Mon. & Ry. 408; 7 Barn. & Ry. 568; 8  
 Cressw. 536; *Hardy v. Ryle*, 4 Barn. & Cressw. 640.  
 Mann, & Ry. 295, 9 Barn. & (f) See *Penpraze v. Johns*, ante,  
 Cressw. 603. 376.

1832.  
 HUTCHINSON  
 v.  
 LOWNDES  
 and others.

1832.  
HUTCHINSON  
v.  
LOWNDES  
and others.

PARKE, J. (a).—There ought to be no rule. The statute says, it shall be lawful for the parties "to issue forth their warrant for committing" the offender, and it is provided that the amount of costs and charges shall be specified in the warrant. The statute, therefore, directs the commitment to be by warrant in writing. In *Hawkins's Pleas of the Crown* (b), it is laid down that a commitment must be in writing under the hand and seal of the justice committing. No doubt the party might have been committed to custody whilst the warrant was in course of being made out, but that is not the present case. The authorities cited are cases of convictions which do not resemble the present case, which is more like the case of a *fieri facias*. It might as well be said that a sheriff could seize goods under a *f. fa.* the writ not being made out until afterwards, as that a magistrate may commit to prison without a warrant being at the time made out.

TAUNTON, J.—The warrant is not mere matter of form. The law of England will not allow the liberty of the subject to be abridged lightly. The party committed is deprived of the advantage of a habeas corpus during the interval between his commitment and the drawing up of the warrant, for the gaoler could make no return to such a writ.

PATTESON, J.—I entirely agree with the rest of the Court. The statute requires that the commitment shall be by warrant, which I think, looking at the act, clearly means warrant in writing.

Rule refused (c).

(a) *Denman*, C. J. had not at this time taken his seat.

(b) *Book 2, c. 16, s. 18.*

(c) In his commentary upon the words "per legem terræ," in *Magna Charta*, Lord Coke says, "Now seeing that no man can be taken, arrested, attached or imprisoned, but by due process of

law, and according to the law of the land, these conclusions seem hereupon to follow: 380, that his warrant or mittimus be lawful, and that must be in writing under his hand and seal." 2 Inst. 53. And see *Com. Digest, Imprisonment* (H. 6).

1832.

WILLIAM BUTCHER, and another, Assignees of A. L. HARRISON, Insolvent Debtor, vs. A. L. HARRISON and HARROLD.

**DEBT** for penalties, on the statute of 13 *Eliz.* c. 5, s. 3(a), brought by the plaintiffs, as the *parties grieved*, against the defendants, for wittingly and willingly putting in ure, avowing, maintaining, justifying, and defending a fraudulent and covenous conveyance of lands of the defendant *Harrison* to the defendant *Harrold*, with intent to delay, hinder, and defraud the creditors of *Harrison*. The action was tried before *Bosanquet*, J. at the Stafford summer assizes, 1832, when a verdict was found for 150*l.*, as the annual value of the land, and 500*l.* being the consideration named in the conveyance, both which sums were claimed in the declaration. Leave to move for a nonsuit having been given,

The assignees of an insolvent are entitled to sue for penalties under the 13 *Eliz.* c. 5, s. 3, as the parties grieved by a fraudulent conveyance of the insolvent's property.

The penalty for a fraudulent conveyance of land with intent to delay &c. creditors, is the annual value only, without regard to the consideration named in the conveyance, (the measure of the penalty in the case of covenous bonds.)

*Godson* now moved to set aside the verdict and for a new trial, or a nonsuit, or in arrest of judgment. The assignees cannot maintain the action, as it must be brought by the party grieved by the fraudulent conveyance. The assignees represent the insolvent, who is one party to the conveyance, and cannot in such representative character maintain an action for penalties against the other party to the conveyance. Then, as to the amount of the penalty, supposing the action to be at the suit of the assignees, it can only be the annual value of the land, whereas the plaintiffs have claimed and obtained a verdict for the sum mentioned in the conveyance in addition to the annual value. Section 3 of the act enacts, that all parties to a covenous or fraudulent feoffment, gift, grant, alienation, conveyance, bond, suit, judgment or execution, made with intent to delay, hinder or defraud creditors, who shall wittingly and willingly put the same in ure, avow, &c., the same shall incur the penalty and forfeiture of one year's value of lands, tenements and hereditaments, &c. and the whole value of goods and

(a) For the section, see the argument.



1837.  
  
 BUTCHER  
 v.  
 HARRISON.

chattels, and also so much money as shall be contained in such covenous and feigned bond, one moiety to be to the queen and her successors, and the other moiety to the party grieved by such fraudulent feoffment &c. The words apply to the several sorts of securities, and vary the penalty according to the nature of the security.

By the COURT (a).—The assignees are the parties grieved. The parties aggrieved are those who have a right to claim the land by due course of law. With regard to the amount of the penalty, we think the verdict must be reduced to the amount of the annual value of the land.

Afterwards the rule was made absolute to reduce the damages to 150*l.* by consent.

(a) Before Parke, Taunton, and Patteson, JJ.; Denman, C.J., not having at this time taken his seat on the bench.

#### DOYLE V. POWELL.

Upon an insurance "at and from Liverpool to Monte-Video and Buenos Ayres, if open; or her final port of discharge in the River Plate, with liberty to wait two months at Monte-Video, if needful," the risk determines when the vessel has staid two months at Monte-Video.

ASSUMPSIT on a policy of insurance upon goods and freight by the ship Triton, at and from Liverpool to Monte Video and Buenos Ayres, if open, or her final port of discharge in the River Plate, with liberty to wait two months at Monte-Video, if needful. Premium, five guineas per cent to return two pounds per cent for risk ending at Monte-Video, on arrival. The declaration averred a total loss by the perils of the seas. At the trial before Lord Tenterden, C.J. at the Middlesex sittings after Trinity term, 1821, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case.

The plaintiff was master and owner of the Triton, and being about to proceed upon the voyage after mentioned, caused the policy to be effected.

7 May, 1828. The plaintiff sailed from Liverpool for

Monte-Video and Buenos Ayres, with a cargo, (consisting partly of goods of his own).

2 August, 1828. The vessel arrived at Monte-Video, at which time there was a war between the government of the Brazils and that of Buenos Ayres, and a Brazilian blockading squadron was stationed off Monte-Video, to prevent vessels sailing up the River Plate to Buenos Ayres; but negotiations were pending, and a peace was shortly expected.

28 September, 1828. The plaintiff having discharged part of his cargo at Monte-Video, and taken in ballast and some goods for Buenos Ayres, took a convenient position for sailing, and was ready to sail for Buenos Ayres, and would have proceeded thither, had he not been prevented as after mentioned.

12 September, 1828. Intelligence arrived at Monte-Video that peace had been made.

30 September, 1828. Peace was not ratified.

4 October, 1828. Intelligence of that event was received at Monte-Video, and the blockade was raised. Until that day the squadron remained off Monte-Video, and no vessels with cargoes were allowed to clear out for Buenos Ayres. Those vessels which did sail were in ballast, and were cleared out for Valparaiso.

28 October, 1828. Notices were stuck up at the Mole Head, and at the custom-house, that no vessels should leave Monte-Video for Buenos Ayres without the payment of certain duties, as well upon the goods on board, as upon the goods landed, and from ten to fifteen days was the period fixed for such payment. The plaintiff on the same day applied to the consignees of his ship, as well as to other persons on shore, to pay the duties on his cargo, but without effect.

5 October, 1828. The plaintiff, taking advantage of a fog, clandestinely sailed from Monte-Video for Buenos Ayres without having paid the duties.

6 October, 1828. The Triton arrived in the outer roads.

1832.

DOYLE

v.

POWELL.

1832.  
Dante  
v.  
Rowell.

On 7 October, 1828. The Triton arrived in the inner roads, where she was sunk with the goods insured on board.

The defendant paid into Court two per cent. as a return of premium for risk ending at Monte-Video.

The question for the opinion of the Court is, whether under the terms of this policy the risk was determined by the stay of the plaintiff for more than two months at Monte-Video. If the Court shall be of opinion that it was, then a nonsuit to be entered; if otherwise, a verdict for the plaintiff for such sum as an arbitrator shall award.

*F. Kelly* for the plaintiff. The risk in this case was not determined by the stay of the ship at Monte-Video for more than two months. The delay was occasioned by the blockade, and was not contemplated by the parties when limiting the period of the stay of the ship at Monte-Video to two months. The instrument must be construed so as to effectuate the intention of the parties. According to the construction contended for by the defendant the risk would determine at the end of two months, under whatever circumstances a longer delay might take place. The object of the parties, when they introduced into the policy the stipulation that there should be liberty to stay two months, was to substitute that period for the undefined, reasonable time, which, in the absence of an express agreement, the law would imply.

*Mauld* for the defendant. The policy must be construed so as to give effect to the intention of the parties, as that intention is manifested by the language which they have chosen to use. The intention of the parties, thus ascertained, was, that the risk should determine as soon as the vessel had remained two months at Monte-Video. The voyage insured is "from Liverpool to Monte-Video and Buenos Ayres, if open, or her final port of discharge in the River Plate, with liberty to wait two months at Monte-Video, if needful." The plaintiff construes the words "if

1832.

DOYLE  
v.  
POWELL.

needful to mean "if the blockade continues." This is not the meaning of these words. Supposing that in the policy it had been expressly stipulated that the vessel should stay a reasonable time, such a clause would have imported that the vessel was at liberty to stay as long as the embargo continued. If the vessel might have sailed from Monte-Video, though not directly, to Buenos Ayres. In *Browne v. Vigne* (a) the insurance was "from London to any port or ports in the River Plate, until her arrival at her last port of discharge in the River Plate." The master passed Maldonado (b), intending to discharge his cargo at Buenos Ayres, but hearing that the latter place was in the hands of the enemy he went to Monte-Video, with intent to make a complete discharge there if the market were suitable. He discharged a part, but not finding the market favourable he did not abandon his original intention of going to Buenos Ayres, if that port should afterwards be accessible. While, however, he was still discharging part of his cargo at Monte-Video, and while Buenos Ayres continued in the enemy's hands, a loss happened by a peril of the seas. It was held that the voyage ended at Monte-Video. The effect of the clause in this policy authorizing the vessel to stay two months at Monte-Video, is to put an end to the policy at the end of that period. It is in the nature of a warranty, that the vessel shall not stay more than two months. Where a vessel is warranted to sail on or before a particular day, such warranty is not complied with unless the vessel actually attempts to sail on that day, though laden and in every respect ready for sea, and prevented from sailing only by stress of weather, *Nelson v. Salvador* (c). In this case the loss was occasioned, not by the perils of the sea, but by the delay. Where a vessel disabled by the perils of the seas went into port to repair, and the master sold part of the goods to defray the expenses, this was held, as to the

(a) 12 East, 283.

(b) A port on the north-eastern side (banda oriental) of the River

Plate, to the east, or seaward, of Monte-Video.

(c) 1 Moody & Malk. 309.

1832.  
 DOYLE  
 v.  
 POWELL.

goods, not to be a loss by the perils of the sea, though those perils were the remote cause of the loss, the immediate cause being the want of funds to pay for the repairs; *Powell v. Gudgeon* (a), *Sarguy v. Hobson* (b).

*Kelly* in reply. The words, "with liberty to stay two months at Monte-Video," did not amount to a warranty that the vessel should not stay there longer than that time. In *Browne v. Vigne* (c), Monte-Video, at the time of the loss, was the port of discharge. In this case Buenos Ayres was the port of discharge at the time of the loss.

*Cur. adv. vult.*

In Michaelmas term DENMAN, C. J. delivered the judgment of the Court. The only question in this case is, what is the meaning of the words, "with liberty to wait two months at Monte-Video, if needful." To decide that, we must consider what the effect would be if those words were omitted. The vessel might have sailed to Monte-Video, and have discharged her cargo there, without going to Buenos Ayres, and in that case there would have been a return of two per cent. premium, in consequence of the risk having ended at Monte-Video; or if, on her arrival at Monte-Video, Buenos Ayres had been open, she might have sailed to that port. If, however, that port was not open, but under blockade, she would not be at liberty to wait at Monte-Video till the blockade was over. The clause in question enables the vessel to remain at Monte-Video for two months. It seems to have been the intention of the parties, that if the blockade ended sooner, she should proceed to Buenos Ayres; but at all events, she could not stay longer than two months at Monte-Video; though, if she had sailed at the end of two months, she would have been protected by the policy. No other construction can be put upon this policy, framed as it is. In order to con-

(a) 5 Maule & Selw. 431.

& Cressw. 7, S. C.

(b) 3 Dowl. & Ryl. 192; 2 Barn.

(c) 12 East, 283.

strue it as required by the assured, words must be introduced, and it must be read as if the liberty were to stay two months or longer; but the latter words not being in the policy, we think that the vessel was at liberty to stay two months and no longer at Monte-Video. Having staid longer, the risk determined at the end of the two months, and the underwriters are discharged.

1832.  
DORSK  
v.  
POWELL.

Judgment for the defendant.

DOE d. THOMPSON v. LEDIARD (a).

**EJECTMENT** for toll-houses and toll-gates in the parish of Cheltenham and Staverton, in the county of Gloucester. At the trial before *Littledale, J.*, at the spring assizes for the county of Gloucester in 1832, a verdict was found for the plaintiff, and leave was given to the defendant to move to enter a nonsuit. A motion being accordingly made in Easter term, 1832, the Court directed the facts to be stated specially for their opinion.

By 6 Geo. 4, c. cxlvii, (authorizing the improvement of a certain road in the neighbourhood of Cheltenham,) the tolls thereby granted were subjected to the payment of moneys borrowed on the credit of former tolls, and to be borrowed on the tolls thereby granted, without preference among the creditors in respect of priority of mortgages.

By an act of 9 Geo. 4, (whereby a branch road was directed to be made,) it was enacted (s. 11) that the mortgagees under the 6 Geo. 4, should be entitled to priority of charge and payment before those who had advanced sums for the purpose of completing the branch road under this act. By section 10 it was declared, that the tolls to be

A local act (6 Geo. 4,) made the tolls of a turnpike-road subject to the payment of the moneys borrowed thereon.

The trustees granted a mortgage of such proportion of the toll and toll-gates, as the money advanced bore or should bear to the whole sum due or to become due on the tolls. By a subsequent act for making a branch road, the tolls of the branch road were to be subject to the moneys borrowed on the former tolls, and such moneys were

(u) Argued and decided in Michaelmas term, 1832. to have priority of charge and payment: Held, per *Dennan, C. J., Taunton and Pattison, JJ., dubitante, Parke, J.*, that a subsequent mortgagee of the tolls and toll-houses of the branch road acquired the legal estate therein; and that after a recovery by him in ejectment he would become a trustee for the former mortgagees, who were only entitled to priority of payment.

1832.  
  
 Doe  
 v.  
 LEONARD.

received on the branch road should be applicable to the payment of creditors who should have advanced money under 6 Geo. 4. Shortly after the passing of the second act, the branch road was made and the toll-house and toll-gate were erected. Afterwards, on the 12th October, 1829, the trustees under the two acts granted to the lessor of the plaintiff twenty-seven mortgages, for 100*l.* each, to secure 2700*l.* previously lent, for the purpose of making and completing the branch road. These grants were sealed and delivered by five of the trustees, and were in the form prescribed by the General Turnpike Act, 3 Geo. 4, c. 126. No interest or principal has been paid to the lessor of the plaintiff. At the time of making the several mortgages to the lessor of the plaintiff, there was and still is due and owing to certain mortgagees entitled to the preference given by 9 Geo. 4, the sum of 17,000*l.* secured to them by mortgages (in the form prescribed by the General Turnpike Act of 3 Geo. 4,) of such proportion of the toll, toll-houses, and toll-gates, as the sums respectively advanced by them did or should bear to the whole amount then due, or thereafter to become due and owing on the credit of the said tolls. The defendant before and at the date of the demise to the nominal plaintiff, was, and still is, in possession of the toll-gates and toll-houses mentioned in the declaration. The yearly income arising from the tolls has not at any time been sufficient to pay the lessor of the plaintiff any portion of the principal or interest due to him, after payment of the sums necessarily expended on the repairs of the roads, and the interest due to prior creditors under the former acts. By 8 Geo. 4, c. 126, s. 49, it is enacted, that if any mortgagee of tolls shall seek to obtain possession of the toll-gates in order to pay sums due to him, it shall be competent for him as lessor of the plaintiff, and upon his demise only, to obtain such possession; but such person shall apply the tolls to the use of all the mortgagees of the premises, *pari passu*, and in proportion to the several sums due to them as such mortgagees.

*Maule* for the plaintiff. The legal estate is in the lessor of the plaintiff. It will be contended, that the legal estate is not in the lessor of the plaintiff, because other creditors have a priority of charge and payment. The other creditors may be entitled to be the first to be paid; but that circumstance will not prevent the vesting of the legal estate in the lessor of the plaintiff. It is immaterial what his duties may be with respect to the application of tolls when he has received them, that is matter of account between him and the other mortgagees. *Doe v. Booth (a)* is in point. The word "charge" is satisfied by holding that the tolls shall be applied in the first instance to the payment of the prior mortgages.

1833.  
DOE  
v.  
LEPIARD.

*W. J. Alexander* contra. The first person who advanced money on the security of the tolls obtained the legal estate in the whole of the tolls and toll-houses, subject to redemption on payment of the sum lent and interest, and subject to the abstraction of a portion of the legal estate by the execution of another mortgage of the same tolls. A person who lends money on such a security must be supposed to calculate the sums required for making and repairing the road, and what sums may be borrowed for that purpose. But if another act is passed which creates new expenses, his calculation is of little value. To obviate this inconvenience, the 10th and 11th sections of 9 Geo. 4 were enacted. The 11th section gives the former creditors a priority of charge as well as of payment. The word charge obviously means priority of legal security. Priority of charge in this sense, is as important to them as priority of payment. The real nature of the lessor's estate is, that he is the mortgagee of the equity of redemption. The mortgage recites the act of 9 Geo. 4, it may therefore be read as if the 11th clause had been recited, and it had been said that the mortgage should be subject to the priority of

(a) 2 Bos. & Pull. 219.



1832.



DOE

v.

LEDGARD.

charge and payment of the other creditors. The 49th section of the General Turnpike Act relates only to such mortgages as are contemplated by that act, viz., to mortgages in *pari passu*. The 9 Geo. 4. must be held to control the operation of the General Turnpike Act, since the former makes a new distribution of the rights of the mortgagees. A mortgage made since 9 Geo. 4. as was said in *Doe v. Booth*, can only operate to effectuate the act.

*Maule*, in reply. The words "priority of charge" are binding on the lessor of the plaintiff when in possession of the tolls, and he will be bound by the words of the act in the application of the tolls. The 9 Geo. 4. not only introduces a new class of creditors, but a new fund also; for the tolls under the act are to be applied in paying persons holding securities under the act of 6 Geo. 4. The lessor of the plaintiff, although he may have no beneficial interest, has the legal estate, and is therefore entitled to make the demise to the plaintiff.

DENMAN, C. J.—The question is, whether the legal estate is in the lessor of the plaintiff. I am very clearly of opinion that he has the legal estate. By the General Turnpike Act, (3 Geo. 4, c. 128, s. 81,) and by the local statute 6 Geo. 4, c. cxlvii., the trustees were empowered to convey to a mortgagee such proportion of the tolls, toll-gates, and toll-houses, as the sum lent bore to the amount to become due on the mortgage. It is said, that the act of 9 Geo. 4. postpones the mortgage of the lessor of the plaintiff to the claims of those who had previously advanced money on the security of the tolls, and prevents the acquisition by him of the legal estate. It is clear that the 11th section of 9 Geo. 4. subjects the claims of the lessor of the plaintiff to a priority of payment of the previous mortgagees, but I do not apprehend that it prevents the acquisition by him of the legal estate. This clause merely gives the other creditors a *priority of payment*; and the intention of the section is accomplished if the lessor of the plaintiff, when

he has recovered the tolls and toll-houses, hold them for the purpose of appropriating the tolls to the extent only of that proportion which is due to him, and subject to the liability of accounting with the other creditors in respect of their previous claims. This accords with the view taken by the Court of Common Pleas, of a mortgage similar to the present. Whatever liability the lessor of the plaintiff may be subject to, or whatever inconvenience may be occasioned to the other parties, if, in order to call him to an account, they are obliged to resort to a Court of Equity, I cannot see anything to prevent the legal estate from vesting in him, and his lessor is therefore entitled to recover.

1832.  
  
 Doe  
 v.  
 Lediard.

PARKE, J.—Previously to the passing of 9 Geo. 4, 17,000*l.* had been advanced by different mortgagees on security of the tolls. Those persons, therefore, were entitled to the legal estate in the tolls and toll-houses liable to have a proportion of that legal estate divested by the advance of moneys by other persons for the purposes of the first act. The 9 Geo. 4 is passed; and the question then arises, what did the lessor of the plaintiff, who advanced money for the purpose of the new act, by virtue of the 10th and 11th sections of that act, acquire? I confess I doubt as to his right to recover. The whole question turns upon the meaning of the words “or priority of charge and payment.” If priority of charge means that the interests of those persons who had advanced money should remain as before, and that they should be in the situation of first mortgagees, the plaintiff would have no right to recover. It is not improbable that the person who framed the 11th clause intended that the rights of the former mortgagees should not be affected. Undoubtedly their rights are affected, if the legal estate is in the lessor of the plaintiff, by having a trustee imposed upon them. My mind is not fully made up on the subject; but the doubt I entertain will be of no

1832.

Doe

v.

LEBARD.

importance; as it is not entertained by the rest of the Court.

TAUNTON, J.—I entirely concur in the view of this case which has been taken by my Lord Chief Justice. On the passing of the 9 Geo. 4, the tolls payable by 6 Geo. 4, and by the former act, were all blended and consolidated into one common fund. The 10th section of 9 Geo. 4 contains an enactment, that the tolls to be received by virtue of that act shall be applicable to the payment of creditors who had advanced money under the former act. By this arrangement, the creditors under 6 Geo. 4 were benefited. If the language of Lord Eldon in *Doe v. Booth* be examined, and the circumstances of that case compared with the present, it will be found that it furnishes a rule for the decision of this case. I cannot distinguish the one from the other. The claim of the lessor of the plaintiff to the legal estate, is not contrary to the priority given by 9 Geo. 4 to the other creditors. The trustees had the power to execute the mortgage, and thereby the legal estate was vested in him. There is, therefore, nothing to prevent him from enforcing his legal right by ejectment.

PATTESON, J.—I am entirely of the same opinion. At the time of the passing of 9 Geo. 4, the legal estate was clearly vested in the former mortgagees. Although each of those mortgagees took only his proportionate aliquot part, yet the whole legal estate was divided amongst them. The form of the mortgages shews that any person subsequently advancing money on mortgage would be let in to a proportion of the legal estate. If the money had been advanced on the security of the former tolls, and the 9 Geo. 4 had never passed, the lessor of the plaintiff would have been let in to such portion of the legal estate. The question then arises, what is the meaning of the word "charge" in the 11th section of 9 Geo. 4. It appears to me, that the words "priority of charge and payment" are used with

reference to the application of the tolls, not to the passing of the legal estate, and therefore that the plaintiff is entitled to recover in this ejectment.

Postea to the plaintiff.

1832.]

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v. r

LESLIE & CO.

**BELSHAW v. MARSHALL and POLAND, Esqrs., Sheriff of Middlesex, and two others.**

**TRESPASS** for breaking and entering the plaintiff's dwelling-house, and taking his goods. The first two defendants as sheriff of Middlesex, and the other two as bailiff and assistant, separately justified under a writ of *fi. fa.* issuing out of C. P., and the sheriff's warrant thereon. Replication: that before the issuing of the *fi. fa.*, a writ of error had been issued and allowed, which writ was a supersedeas of the *fi. fa.*: and that the plaintiff had given due notice to the defendants of the issuing and allowance of the writ of error, and required them to cease from executing the writ, which they refused to do, and afterwards committed the trespasses. The rejoinder denied that due notice had been given by the plaintiff to the respective sets of defendants, or that they had been required to cease from executing the writ. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after Easter term, 1832, it appeared that the writ of *fi. fa.* had been issued and the warrant delivered to the sheriff by the other two defendants, on the 3d December, 1830: that notice of the allowance of the writ of error had been given to the sheriff, (at whose office a copy of the allowance was left and the original shewn,) and to the other defendants, the officers, on the same day, but that the officers, although told that the allowance of the writ of error operated as a supersedeas of the execution, had continued the possession of the goods seized. The jury found that notice of the allowance of the writ of error had been given at the office of the sheriff before the writ of *fi. fa.* was received, and

The allowance of a writ of error is sufficient to render the sheriff, executing a writ of *fi. fa.* after notice of such allowance, liable in an action of trespass, without any writ of supersedeas being issued; and notice to the sheriff is notice to the officers executing the process.

The Court said that there did not appear to be any precedent for issuing a supersedeas upon the allowance of a writ of error.

1852.

BRISBANE  
v.MANSELL  
and POLAND.

returned a verdict for the plaintiff. It had been contended at the trial that the allowance of the writ of error did not operate as a supersedeas of execution so as to make the sheriff a trespasser in respect of the subsequent seizure under the writ, and that even if it did operate as a supersedeas, the officers, having seized before notice to them, could not be considered as trespassers. Leave was given to move for a nonsuit upon these points. *Campbell* in the following term moved accordingly, or for judgment non obstante veredicto.

The COURT took time to consider, and now in this term the judgment of the Court was delivered by

PARKE, J.—We have looked into the authorities, and are clearly of opinion that the notice of the allowance of a writ of error was sufficient to render the sheriff liable in this action without any supersedeas being issued: nor does there appear to be any precedent for such a proceeding; and notice to the sheriff was notice to the officers. There will, therefore, be no rule.

Rule refused.

#### THE KING v. EDWARD PRASE, and others.

By a private statute, reciting that a proposed railway between S. and W. P. and its branches would be of great public

utility, a company was incorporated for the making of such railway in a line parallel to and in some places within five yards of a highway, from which line no deviation was to be made exceeding 100 yards. A subsequent act authorized the use of locomotive engines on the railway. Upon an indictment for using the engines, whereby horses were frightened and accidents occasioned on the highway, the alleged nuisance was found by verdict, but it was also found that the engines were of the best construction and used with due care, and that by reason of these engines the public obtained better and cheaper coal: Held, that such a restriction of the rights of the public was not unreasonable, and must be presumed to have been contemplated by the legislature when authorizing the use of locomotive engines without words of qualification.

locomotive engines with waggons of coal attached to them to be propelled by steam and burning coal &c., in the said engines close to the highway, so as to corrupt the air, and causing them to be worked on the said rail-road with great noise and violence, and with terrific appearances, noises, &c.; whereby it became dangerous for the subjects of this realm to pass on the highway near the said rail-road: To the great terror and common nuisance of all liege subjects passing with their horses &c., along the said part of the said highway.

1832.  
The King  
v.  
PEASE.

The indictment having been removed by certiorari into this Court, the defendants pleaded, not guilty. At the trial, before *Parke, J.*, at the Yorkshire (a) spring assizes, 1832, a special verdict was found to the following effect:

The rail-road, which had been constructed under and by virtue of 1 & 2 Geo. 4, c. xlv., and 4 Geo. 4, c. xxxiii., ran for the distance of more than a mile, within the parish of Stockton-upon-Tees, parallel and adjacent to the Stockton and Yarm highway, there being in some parts only five feet of interval between them. The railway, which was raised five feet above the highway, was separated from it, for the greater part, only by a low hedge. The defendants, by order of the Stockton and Darlington Railway Company, placed upon the rail-road six locomotive engines, which travelled on the rail-road, and by their appearance, and the noise which they made, alarmed the horses of many persons, causing thereby many accidents upon the highway, and impeded and annoyed persons in passing upon the highway with horses &c. The locomotive engines used were of the best construction known at the time when they were constructed, and the defendants from time to time adopted many improvements upon them. The defendants managed the engines with due care and diligence, and by use of them effected their object of facilitating

(a) A rule had been made for a not be had in the county of trial in Yorkshire, upon a suggestion that an impartial trial could Durham.

1832.  
  
 The King  
 v.  
 PRASE.

the transport of coals, so that the public obtained coals cheaper by reason of the use of such engines. . . .  
 The Stockton and Darlington Railway Company was united and incorporated by 1 & 2 Geo. 4, c. xlii. for the purpose of making a railway from Stockton to Witton Park Colliery, with several branches. By this act, (which in the preamble recites that the rail-road and branches would be of great public utility by facilitating the conveyance of coals and other merchandize, and would materially assist the agricultural interest as well as the general traffic of that part of the country, and tend to the improvement of estates in the vicinity of the railway,) the Company is empowered to make the proposed railway, doing as little damage as may be, and making full satisfaction. By section 7, the Company is restrained from deviating more than 100 yards from the course or direction laid down in a plan of the intended line of road deposited with the clerk of the peace. By section 81, the Company is authorized to use the railway with *carriages and horses*. The act of 4 Geo. 4, c. xxxiii., enacts, in section 8, that it shall be lawful for the Company or any person authorized by them (a), from thenceforth to make and erect such and so many *locomotive engines* as the Company shall from time to time think proper and expedient, and to use the same in and upon the railways for the purpose of facilitating the conveyance of goods and passengers along the same roads.

*Cresswell* for the crown. The Company being authorized under 1 & 2 Geo. 4, c. xlii., s. 7, to deviate 100 yards from the course laid down, might have exercised the power of using these engines given by 4 Geo. 4, c. 83, (P.C.). The latter statute does not impose upon the Court the necessity of putting such a construction upon it as will derogate from the rights of the public. An authority or a restriction contained in an act of parliament must not be extended against common right. *Plowd. Comm.* 463, 465 (b). All

(a) *Post*, 693 (g).

(b) *In Eyston v. Stuck*.

reasonable exceptions must be presumed, *Dr. Benham's case (a)*, *Brett v. Brett (b)*, *Emanuel v. Constable (c)*; more especially when the att. is obtained by private adventurers, *Hornby v. Houlditch (d)*, and no compensation is provided for the public, *Ree v. Morris (e)*. It was the duty of the Company to alter the line of the rail-road, or by erecting fences or screens, to exclude the engines from sight.

in *F. Pollack, contra*. The rule for construing a statute is, to suppose the lawgiver present, and to be asked what he intended, and then to return such an answer as an upright and reasonable man might be expected to give. *Bacon's Abr.* Statute (I.) 6. This undertaking has a double object; profit to the adventurers, and benefit to the public; and that benefit was a sufficient compensation to the public for any inconvenience which these engines may occasion, without direct compensation. In some cases, even where the property of private individuals is taken for a public purpose, no indemnity is given; as in turnpike acts, where the trustees are authorized to take materials from waste lands, without indemnifying the owners. [Lord *Tenterden*, C. J. That is not the case in all turnpike acts, and ought to be so in none (f).] The benefit of travelling on this railway with locomotive engines is not confined to the Company. [Lord *Tenterden*, C. J. The Company enjoys a monopoly in the use of the engines (g).] The deviation clause was introduced with reference to the convenience of the Company in following a particular line, and not with a view to the protection of the public against annoyance.

(a) 18 Co. Rep. 118 b.      'ist; such owners using the general

(5) Addams, 210; 4: M. & R.: roads of the kingdom; upon impro-

**108, n** advantageous terms, even to them-

(c) 3 Russel, 498.                      selves, than if payment were re-

(d) 1 T. R. 93 n.      quired to be made in respect of

110 (c) 1 Bern. & Adol. 441. materials taken from all waste

(U) Though no direct compen- lands, with a further, unproduc-

sation is given to the owners of tive expense to be incurred in

wastes, perhaps a sufficient *indirect* ascertaining the value.

compensation may be found to ex- (g) Ante, 692(a).



1832.  
The King  
v.  
Parke.

Neither is it found, that at the points where the railway approaches the highway, such deviation would have been practicable. *Rex v. Russell* (a).

*Cresswell*, in reply. In *Rex v. Russell*, Lord Tenterden, C. J. did not concur in the judgment of the Court; nor did *Holroyd, J.* found his opinion upon the principle of compensation to the public, adopted at the trial. The provision in turnpike acts, which has been alluded to on the part of the defendants, is beneficial to the public. Here, the public is injured for the benefit of those who have a monopoly in the use of the engines.

*Cur. adv. vult.*

The judgment of the Court (b) was (M. T. 1832) delivered by

PARKE, J., who, after stating the substance of the special verdict, proceeded as follows.—The case turns upon the meaning of the 8th section of 4 Geo. 4, c. 36; and the question is, whether that section gives an authority to the Company to use locomotive engines on the railway absolutely, or only with some implied condition or qualification, that they shall employ all practicable means to protect the public against any injury from them. Those means were, on the argument, suggested to be the altering of the course of the railroad, or the erection of fences or screens of sufficient height to exclude the view of the engines from the passengers on the common highway. Now, the words of the clause in question clearly give to the Company the unqualified authority to use the engines; and we are to construe provisions in acts of parliament according to the ordinary sense of the words, unless such construction would lead to some unreasonable result, or be inconsistent with or contrary to the declared or implied intention of the

(a) 9 D. & R. 566; 6 B. & C. 566. *ton, J.J.; Lord Tenterden, C. J.,*  
(b) *Littledale, Parke, and Tenterden* having died since the argument.

frankness of the law, in which case the grammatical sense of the words may be extended or modified; instances of which are to be found in the case of *Egston v. Studd* (a) and *Bacon's Abr. Statute* (I.) 6(b), referred to during the course of the argument. Let us then consider whether there is anything unreasonable or contrary to the express or implied intention of the legislature, in construing these words in their ordinary sense, and without any such condition or qualification as before mentioned. It is clear that the makers of this and the prior act had in view the construction of a railroad (with its branches) in a certain defined line, which (1 & 2 Geo. 4, c. xlv. s. 6, and 4 Geo. 4, c. 33, s. 3,) had been delineated on a map deposited with the clerk of the peace; and from which line the road was not to deviate more than 100 yards, and not into the grounds of persons not mentioned in the book of reference. The legislature therefore must be presumed to have known that the railroad would be adjacent, for a mile, to the public highway, and consequently that travellers upon the highway would be in all probability incommoded by the passage of locomotive engines along the railroad. That being presumed, there is nothing unreasonable or inconsistent in supposing that the legislature intended that the part of the public who might use the highway should sustain some inconvenience for the sake of the greater good to be obtained by other parts of the public in the more speedy travelling and conveyance of merchandize along the new railroad. Can any one say that the public interests are unjustly dealt with when the injury to one line of communication is compensated by the increased benefit of another? So far is such a proceeding from being unreasonable, that it was held by the majority of the judges, in *Rex v. Russell* (c), that a nuisance was excusable on that principle at common law; and whether that be the law or not, at least it is clear that an express provision of the legislature,

1832.  
  
*The King*  
*v.*  
*Pease.*

(a) Plowd. 463.

(c) 9 Dowl. & Ryf. 566; 6 Barn.

(b) 5th and 6th ed. vol. vi. 386. & Cressw. 566.

1832.

The KING

v.  
PEASE.

having that effect, cannot be unreasonable. It is true, that the same object (that of giving one part to the public for the benefit of the use of these engines) might have been effected, without the same injury to the other part of the public using the road, if the act had imposed on the Company the obligation of erecting a sufficient fence or screen at their own costs, or had provided that the line of the road should be different at that place. But it is by no means necessary to imply such an obligation in order to make the clauses reasonable and consistent; for it has been shewn to be so without it; and it is natural to suppose that, if such a condition had been intended, it would have been particularly expressed. For these reasons we think that the defendants were justified, under the above-mentioned section of 4 Geo. 4, c. 33.

Judgment for the defendants.

W. L. MELLER and others, Assignees of Sir H. Goodricke, Bart. Sheriff of Yorkshire, v. PALFREYMAN and another.

A bail bond, taken under an attachment for not putting in an answer, cannot be assigned.

The creditor's remedy is by action in the name of the sheriff.

**DEBT** on bond. The declaration, after reciting an attachment from the Court of Chancery, for a contempt in "not answering at the suit of *W. L. Meller* and others, plaintiffs," stated that the sheriff took the parties; that the defendants became bail for them, and gave a bond to the sheriff, conditioned for their appearance in Chancery on a certain day; that the parties did not appear, whereby the bond became forfeited; and that the sheriff duly assigned the bond to the plaintiffs.

General demurrer, and joinder.

*Crowder*, in support of the demurrer. At common law, a bond, being a chose in action, was not assignable; and the

question is, whether this bond is rendered so by 4 Anne, c. 16, § 20. The provisions of that statute were evidently intended to apply to such bail bonds as are within the 23 Hen. 6, c. 9, by which the sheriff is directed to "let out of prison all manner of persons by him arrested, or being in his custody, by force of any writ, bill, or warrant in any action personal, or by cause of indictment of trespass, upon reasonable sureties of sufficient persons," &c.. The statute of Anne enacts, "that if any person shall be arrested by any writ, bill or process, issuing out of any of her majesty's Courts of record at Westminster, at the suit of any common person," and the sheriff takes bail from such persons, he shall, at the request and costs of the plaintiff in such action or suit, assign to him the bail bond or other security; and that if such bail bond &c. be forfeited, the plaintiff, after assignment, may sue upon it. Looking at both statutes together, it is clear that the provisions of 4 Anne do not extend to bail bonds taken from persons who are attached to answer for a contempt.

Here, he was stopped by the Court.

*White, contra.* If upon this process the sheriff was authorized to take bail, he is bound by the statute of Anne to assign the bail bond. In the case of *Studd v. Acton* (a), the sheriff's right to take a bail bond in the case of an attachment is recognized, although the Court held that the case was not within the stat. 23 Hen. 6, c. 9. In *Morris v. Hayward and others* (b), which was an action by a late sheriff against the obligors in a bail bond, taken by him as sheriff in a similar case, the Court considered the bond valid, and held that the action was maintainable. The statute of Anne is more extensive in its application than 23 Hen. 6, c. 9. The sheriff is required to assign the bail bond or other security at the request and costs of the plaintiff in such action or suit. The latter word does not

(a) 1 H. Bla. 468.

(b) 6 Taunt. 569.

1833.

MILLEN.

v.

PALFREMAN.

occurs in the statute of *Hen. 6*, and it is reasonable to suppose that the word was introduced in order to cover the case of bonds taken upon arrests, under process out of a court of equity. In *Beddall v. Page*(a), the defendant having been taken under an attachment for want of an answer, gave the usual bond to the sheriff, conditioned to put in his answer; and upon the breach of the condition the plaintiff obtained an order for a messenger to go against the defendant, and took an assignment of the bail bond, upon which he brought his action. An injunction was moved for on the ground that the plaintiff ought not to pursue a double remedy, and that by sending the messenger he has elected to proceed in equity. *Shadwell, V. C.* said; that the giving a bail bond would be quite useless if no proceeding could be taken on it, and refused the motion. [*Parke, J.* In the Court of Exchequer the practice is, in a case like the present, to take an equitable assignment of the bail bond, and to sue upon it in the name of the sheriff(b).

DENMAN, C. J.—This bond is clearly not assignable, unless it be made so by virtue of 4 *Anne*, c. 9. It does not appear to me that the words of that statute extend to this case. There may be an equitable assignment of such a bond; but then the action must be brought in the name of the sheriff, whom, however, a court of equity would restrain from releasing or discontinuing the action(c). The statute of *Anne* (under which alone there can be in any case a legal assignment of the bail bond) does not apply to bonds given upon process out of a court of equity. It is said that the word "suit" extends the provisions of the statute of *Anne* to such process; but the word "suit" may mean as well an action at law as proceedings in Chancery.

(a) 2 *Simons*, 294.(b) See the course of proceeding, *Mann. Exch. Prac.* 1st ed. 56.

(c) Courts of law have also

interfered in cases of fraudulent releases by nominal plaintiffs. *Legh v. Legh*, 1 *Bos. & Pull.* 447; *Miller v. Aris*, 3 *Esp. N. P. C.* 231.

**PABKE, J.**—I am of the same opinion. The statute of Anne does not apply to this case. This is the case of process at the suit of the crown.

1839.

MILLEN  
v.  
PALFREMAN.

**TAUNTON, J.**—I am also of the same opinion. The words of the statute are—if any person shall be arrested “by any writ, bill, or process, at the suit of any common person,” and bail be taken, the sheriff, at the request of the plaintiff in such suit or action, shall assign to him. These words, “writ, bill, or process, at the suit of any common person,” cannot apply to his majesty’s writ of attachment for a contempt. Besides, the action must be brought in the Court out of which the process issued, for such has always been the practice (a). It is a strong circumstance against the argument of the plaintiff, that during more than 125 years, which have elapsed since the passing of the statute of Anne, no case is to be found of an action brought by an assignee of a bail bond taken under process by attachment.

Action by assignee of bail bond must be brought in Court out of which the bailable process issued.

**PATTESON, J.**, concurred.

### Judgment for the defendant.

(a) *Chesterton v. Middlehurst*, 1 Burr. 642; *Walton v. Bent*, 3 Burr. 1923; *Morris v. Rees*, 2 W. Bla. 808, 3 Wils. 348; *Dison v. Hemlock*, 6 T. R. 365.

If the action be brought in another court, the proceedings may be stayed for irregularity; *Trustin v. Teylon*, Barnes, 94; *Hew v. Bridgewater*, *ibid.* 117; *Wright v. Walmsley*, 2 Campb. 396; or the defendants may plead it specially, (*semble*, to the jurisdiction in abatement); 2 Campb. 396. But the objection cannot be taken under a plea of non est factum; *ibid.*

Whether the sheriff is so re-

stricted, has been the subject of conflicting decisions, in K. B., (*Donatty v. Barclay*, 8 T. R. 152,) where it was held that he was so restricted; and in C. P., (*Newman v. Fawcitt*, 1 H. Bla. 631,) and the Exchequer, (*York v. Ogden*, 5 Price, 174,) where the contrary was held.

It has been observed that equitable jurisdiction in respect of proceedings in an action on the bail bond is, however, given by the statute generally, to the court in which the action is brought: Selw. N. P. 7th ed. 574.

1832.

**CARVALHO and others, Assignees of FORTUNATO a Bankrupt, v. BURN and another.**

A. at Liverpool, having consigned goods to B. at Bahia, for sale on A.'s account, draws bills on B. to be paid out of the produce of the consignments. A. negotiates the bills with C. in London. Upon B.'s refusing to accept the first of the bills which is presented, A. directs B. to hand over to D., C.'s agent at Bahia, any property of A.'s which may be remaining in B.'s hands. Before this direction reaches Bahia, or is acted upon by B., A. becomes bankrupt. A. afterwards receiving the property from B., is guilty of a tortious conversion.

Whether by such direction C. acquired any equitable lien upon the property, *quære*.

**TROVER.**—Plea, not guilty. At the trial before *Parke, J.* at the Lancaster spring assizes, 1831, a verdict was found for the plaintiff, damages 2049*l.*, subject to the opinion of this Court on the following case:—

20th May, 1829.—*Fortunato*, who had been for some years a merchant in Liverpool, committed an act of bankruptcy. The plaintiffs were appointed assignees under a commission issued 23d of June, 1829. The bankrupt had been in the habit of consigning cotton goods belonging to himself, to a *De Rego*, his agent at Bahia, for sale on the bankrupt's account. By the course of business the bankrupt, on the faith of, and against his consignments, drew on *Rego* bills proportioned to the consignments, which bills *Rego* was to pay out of the proceeds. The bankrupt was in the habit of procuring the bills so drawn to be indorsed and negotiated in London by the defendants, who received for so doing a customary (*a*) brokerage.

In 1828 and 1829 the bankrupt had made such consignments to *Rego*, at Bahia, by eight vessels. Between the 29th of November, 1828, and the 16th of March, 1829, the bankrupt drew and negotiated with the defendants, who advanced the amount to the bankrupt, bills to the amount

(*a*) As the defendants made no advances themselves, it was competent to them to stipulate for any percentage, under the name of brokerage, which the bankrupt might be willing to pay. This percentage would be calculated partly in respect of the trouble in negotiating the bills, (to which portion of the remuneration the term "brokerage" would alone properly apply,) partly upon the inconvenience arising from the liability to advance the money for an indefinite period, in case the bills should be dis-

honoured; and partly upon the danger of ultimate loss, in case of the insolvency of the drawer.

A. cannot stipulate for more than 5 per cent. for the use of his own money; but he may charge B. 50 per cent. as the price of lending B. his name and guarantee for the purpose of enabling B. to borrow money at 5 per cent. of C., or to postpone the payment of an old debt owing from B. to C.; the solvency of B. being in either case a matter of indifference to C., if satisfied as to the solvency of A.

of 3800*l.*, which being all dishonoured by *Rego*, were accepted and taken up by *Vogeler* for the honour of the defendants. Goods had been consigned by the bankrupt to *Rego* to an amount which authorized the bankrupt to draw to the extent of 3800*l.*; and insurances were effected on such goods by the defendants, under the directions of the bankrupt. The bankrupt received due notice of dishonour.

On the 23d of March, 1829, the defendants received notice of the dishonour of the bills drawn in November, and on the same day wrote to the bankrupt as follows:—"It is with the greatest concern we have to inform you that we have this day received advices from Bahia, that Mr. *A. D. C. Rego* had refused to accept your draft on him on the 29th of November, for 500*l.*, which intelligence, as you may well conceive, has caused us no small degree of surprise and mortification, and particularly as we cannot but be apprehensive that the same unlooked-for fate may likewise await your subsequent drafts on him. We have, therefore, most earnestly to request, that you will not lose a moment in putting Mr. *Rego* in such a situation as to enable him to pay your drafts; and that you will also resort to the necessary means to furnish us with funds sufficient to reimburse us for the amount of any of your drafts that may come back to us protested for nonpayment, whenever you are aware of such being the case.

On the 27th of March, 1829, the defendants received from the bankrupt the following letter, dated the 25th of March, 1829:—"The subject of your favour of the 23d grieves me most bitterly, especially at the present time, when I am quite unprepared to act as it is both my wish and my duty; therefore I request you to send back the protested drafts to your agent in Bahia, to have them accepted by Mr. *Rego*, allowing him an extension of the time to liquidate, as, by this mode, you only will incur the inconvenience of delay; and I will give instructions to Mr. *Rego* to settle with your agent as the demands arise from the said bills."

On the 4th of April, 1829, the defendants wrote to the

1832.

CARVALHO  
v.  
BURN.



1829.

CARVALHO

v.

REGO.

bankrupt, as follows:—"We are duly favoured with your letter of the 23d ultimo, and in reply thereto we beg to observe, that the bills Mr. Rego refused to accept have not yet been returned to us, as it would have been quite irregular to have returned them merely for the want of acceptance; but in case of nonpayment on the days on which they became due, they are sure to be sent back with the necessary protests; and it is quite impossible for us or our agents to grant any extension of time, as we are not the holders of the bills, with whom alone rests the power of granting such accommodation. As indorsers of the bills, they will of course come back upon us first; however, we most fervently hope that such an unpleasant event will not take place, and that Mr. Rego will pay them. We have too high an opinion of your honour to suppose for a moment that you would have drawn these bills without having the means necessary for their discharge in the hands of Mr. Rego, and therefore we most earnestly request that you will write to Mr. Rego, by the first vessel, with orders that in case he does not pay your drafts, he will immediately hand over such property as he may have of yours, of an equivalent value to the bills not paid by him, to our agent, Mr. Fogeler of Bahia, whom we have requested to pay the bills for our honour."

On the 11th of April, 1829, the defendants received from the bankrupt the letter following, dated the 9th:—"Agreeably to your injunctions, I will write to Mr. Rego, per brig Wavertine, to sail on the 14th of this month, directing him to hand over to Mr. Fogeler property of mine in his hands, to cover the amount of bills that eventually may not be paid; I say eventually, because I do still hope that some of them will be accepted; for the cause of Mr. Rego's not having done so, was the impossibility of realizing and collecting debts. I beg to assure you that I will do all that is due of me to secure your property, and that you shall not be sufferers in the least by this unfortunate transaction, beyond some delay."

On the same day the bankrupt wrote to *Rego* as follows:—"I have engaged and promised to *Burn* and Co. that you shall pass into the hands of their agent in your city, *Mr. Vogeler*, all the property which may exist in your hands for my account. You will arrange with that gentleman the mode in which this order may be carried into effect, with this understanding, that it is essential that the whole be done under perfect secrecy, for which I shall consider myself very much obliged to you. It appears to me that the best plan would be, to pay him the liquidated amounts as fast as the same are received."

This letter reached *Rego* in June, 1829, on the 11th of which month he wrote to the defendants as follows:—"The reason which obliged me to refuse acceptance to the bills which *Mr. Fortunato* drew upon me on the 29th of November last, and subsequent months, was the stagnation of a great part of the goods which he consigned to me, and of which there still exists a great part in my possession, which I will deliver to *Mr. Vogeler*, in consequence of the order to do so, received from *Mr. Fortunato*; which delivery I intend effecting by the end of the current month."

30 June, 1829, the goods mentioned in the declaration, being part of the goods so consigned for sale, were by *Rego* handed over to *Vogeler*.

15 July, 1829, *Rego* wrote to the defendants—"The present has for its sole object the informing you, that on the 30th ultimo I placed at the disposal of *Mr. Vogeler* 3,625*l.* 2*s.*, in goods belonging to *Mr. Fortunato*."

*Vogeler*, before the commencement of this action, sold the goods by direction of the defendants, and paid them the proceeds.

The case was argued (a) in Trinity term, 1829, by *Crompton* for the plaintiffs, and *Starkie* for the defendants.

For the plaintiffs the following cases were cited, *Free-*

(a) Before Lord Tenterden, C. J., *Littledale, Parks, and Thunton, JJ.*

1852.

*Carvaero*  
v.  
*Burn*

1832.  
  
 CARVALHO  
 v.  
 BURN.

*moult v. Dedire (a), Williams v. Lucas (b), Hunt v. Mortimer (c), Vacher v. Cocks (d), Lempriere v. Pasley (e).*

The defendants also relied on *Lempriere v. Pasley*; and they cited *Bailey v. Culterwell (f), Row v. Dawson (g), Yeates v. Groves (h).*

*Cur. adv. vult.*

LITTLEDALE, J. now delivered the judgment of the Court (i).

This was an action of trover, to recover the value of a quantity of cotton goods, which came to the possession of the defendants on the 30th of June, 1829, in the Brazils, and was afterwards sold by them. On the 20th of May, an act of bankruptcy was committed by the bankrupt *Fortunato*, and a commission issued on the 23d of June, under which the plaintiffs were appointed assignees. The goods in question were part of some consignments made by the bankrupt at different times, to a person of the name of *Rego*, at Bahia; against these consignments the bankrupt drew on *Rego* bills of exchange, which were negotiated by the defendants' indorsing them. No goods appear to have been specifically appropriated, by the bankrupt's directions, to the payment of any particular bill; but the bills were drawn generally, though proportioned in amount, in a certain degree, to the value of the consignments. In March, 1829, information was received by the defendants in London, that some of the drafts had been refused acceptance; in consequence of which they became liable on their indorsement; and being apprehensive that other bills would meet with the same fate, they called upon the bankrupt to make provision for their reimbursement; a correspondence followed, and the question in this case turns mainly upon its meaning and effect.

(a) 1 P. Wms. 439.

(b) Ibid. 430, n. 5th ed.

(c) 10 Barn. & Cressw. 44.

(d) 1 Barn. & Adol. 145.

(e) 2 T. R. 485.

(f) 2 Mann. & Ryl. 564; 8

Barn. & Cressw. 448.

(g) 1 Vez. sen. 331.

(h) 1 Vez. jun. 280.

(i) *Littledale, Payne, and Paterson, JJ.*; Lord Tenterden, C. J. having died since the argument.

It is quite clear that the assignment vested in the assignees, all the personal estate and effects in which the bankrupt was, at the time of the act of bankruptcy, beneficially interested, (with the statutory exceptions, 6 Geo. 4, c. 16, ss. 81, 82, 86, 112); but as the object of the assignment of the bankrupt's property is, that it may be applied to the payment of his debts, it is equally clear that nothing passed by it which the bankrupt then held in trust for others, or in which he had only a mere legal interest; *Scott v. Surmah*(a); *Winch v. Keeley*(b), *Carpenter v. Marnell*(c), *Gladstone v. Hadwen*(d); but if, at the time of the act of bankruptcy, the bankrupt possessed a possibility of interest, from which a benefit to his creditors might result(e), if he had the legal interest in any property, and it was uncertain whether he would hold any part of that property, or if any, what part, as a trustee for others, the whole would pass by the assignment; it could not remain in the bankrupt, subject to be transferred on a future contingency; and if it did pass to the assignees, it could not be divested out of them in whole or in part, by the happening of events subsequent to the act of bankruptcy, which might make them hold the whole, or some specific part, as trustees only; for there is no provision in the statute which takes out of the assignees a right once vested in them.

This whole question then is, not whether the plaintiffs were or were not trustees for the defendants, for the whole or part of those goods, at the time of action brought, but whether the property in those goods, or in any part of them, vested in the plaintiffs by virtue of the assignment. To decide this we must refer to the terms of the bargain between the bankrupt and defendants, contained in the two important letters of the 4th and 5th of April. The material parts of that of the 4th of April are as follows:—“As indorsers of the bills, they will of course come back upon

(a) Willes, 400.

(d) 1 Maule &amp; Selw. 517.

(b) 1 T. R. 619.

(e) Per Lord Alvanley, C. J. 3

(c) 5 Bos. &amp; Pull. 40.

Bos. &amp; Pull. 41.

1892.

CARVALHO  
v.  
BORN.

us first, however we most fervently hope that such an unpleasant event will not take place, and that Mr. Rego will pay them; we have too high an opinion of your honour to suppose for a moment that you would have drawn these bills without having the means necessary for their discharge in the hands of Mr. Rego; and therefore we most earnestly request that you will write to Mr. Rego, by the first vessel, with orders that in case he does not pay your drafts, he will immediately hand over such property as he may have of yours, of an equivalent value to the bills not paid by him, to our agent, Mr. Vogeler, of Bahia, whom we have requested to pay the bills for our house," &c. The bankrupt answers, on the 9th of April, "Agreeably to your injunctions, I will write to Mr. A. C. Rego per brig Waversee, to sail on the 12th of this month, directing him to hand over to Mr. Vogeler property of mine in his hands to cover the amount of bills that eventually may not be paid. I say eventually, because I do still hope that some of them will be accepted; for the cause of Mr. Rego's not having done so, was the impossibility of realising and collecting debts. I beg to assure you that I will do all that is due of me to secure your property, and that you shall not be sufferers in the least by this unfortunate transaction, beyond some delay." The proposal by the defendants is, that if Rego do not pay the bankrupt's drafts, the bankrupt shall hand over to the defendants' agents so much property in his hands as may be equivalent to the drafts unpaid. The letter of the 9th of April is nothing more than an assent to the defendants' proposal. It does not extend or vary it, and constitutes a binding agreement between the parties to the same effect. In this agreement the event upon which the property is to be transferred is uncertain, and the amount to be transferred is also uncertain. If Rego paid the bills, no goods would be in that case subject to delivery to the defendants; if he did not, and had sold the goods previously to the communication from the parties being received in the Brazils, no goods would be capable of being delivered; if the goods existed at that time, the value of the goods to

be delivered, and the specific goods to be delivered, would be still uncertain and unascertained.

It is therefore quite impossible to contend that the legal property in any part of the goods then in *Rego's* hands, passed by this bargain to the defendants; and it seems to be equally impossible to say, that the contract operated as an equitable assignment of the whole or of any specific part, at that time or before the act of bankruptcy; for it is clear that the parties to it did not consider that the whole or any specific part was *then* to be held by the bankrupt for the defendants; or that it was absolutely and at all events to be assigned to the defendants at any future time. Until certain contingencies happened, and until something more were ascertained and done, the equitable as well as the legal interest would be in the bankrupt; and, if so, it would pass to his assignees.

It is not necessary to decide whether the agreement gave an irrevocable, though contingent, interest in the goods, and whether the assignees, in the events which have since happened, are or are not trustees for the defendants, and bound to repay, out of the proceeds of the goods in question, the amount which they have paid. The defendants may have an equitable right to be paid out of the goods or their proceeds; but the question, whether they have such a right, and the mode of enforcing it, belong to a court of equity.

We have passed over the letter of the 11th of April without notice, because that letter was not communicated to the defendants, and does not form a part of the contract between them and the bankrupt. Taken alone, it is a mere countessanable authority, which was countermanded by the bankruptcy.

We therefore think that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs (a).

(a) And see *Doe & Martin v. Roe*, 4 Ves. 119; *Jones v. 5 Esp. N. P. C. 105*; *Matthews v. Gibbons*, 9 Ves. 407, 411.

1832.

A right, by custom, to exclude persons from selling marketable articles in their shops on market days, without the limits of a market, is valid in law.

Such a right is not incidental to the granting of a market, *semble*.

The Mayor, Aldermen, and Burgesses of MACCLESFIELD  
v. PEDLEY.

**CASE**, for an injury to the plaintiffs' market.

The plaintiffs declared that they were lawfully possessed of a certain market within the borough, and that butchers and others, selling their flesh meat on the market days in that town, ought (a) not to sell it in private houses, but in the open public market, on the plaintiffs' stalls, or on stalls placed there by their consent, paying a stallage; and that the defendant sold meat on market days in a private house in the town. Plea,—not guilty.

At the trial before *Bolland, B.*, at the Chester spring assizes, 1832, the following facts appeared:

1261. *Edward*, Earl of Chester (b), by his charter, granted and confirmed to his burgesses of Macclesfield "that the said town should be a free borough (c), and that they should have a merchants' guild, and should be quit of toll, passage, frontage, stallage, and other customs."

1666. *Charles 2*, by his charter, ordained, granted, ratified and confirmed to the mayor, aldermen, and burgesses, and their successors, the incorporation and body corporate, and all and singular the liberties, free customs, franchises, immunities, exemptions, acquittances, and jurisdictions of the same body corporate, lands, tenements, markets, fairs, tolls, customs, liberties, privileges, franchises, immunities, powers, authorities, acquittances, jurisdictions, profits, advantages, emoluments, and hereditaments whatsoever,

(a) As to this concise mode of declaring without shewing the origin of the obligation, see *The Bailiffs, Burgesses, &c. of Tewkesbury v. Diston*, 6 East, 438, and 2 Smith, 508; *The same v. Bricknell*, 2 Taunt. 120; 2 Wms. Saund. 172, n. 1; *et vide ibid.* 113, n. 2; 1 Chit. Plead. 5th ed. 414, &c. 2 Chit. Plead. 818.

As to the mode of stating such a right in a plea, *vide Hall v. Smith*, 10 East, 476.

(b) Afterwards *Edward 1*.

(c) As to the power of count-palatine to create boroughs, *vide* 4 Inst. 205, 211; *Carew's Surrey of Cornwall*, 70; *Placita de Quo Warranto*, temp. *Edw. 1*, fo. 2, 3, 111; 3 Mann. & Ryl. 255.

which the mayor, aldermen and burgesses, or their predecessors, had lawfully had, &c. by reason of any charters or letters-patent by King *James* the First, or by any kings or queens of England theretofore made, or by any other lawful mode, right or custom, use, prescription or title, theretofore used or enjoyed, *habendam* in as ample manner as before.

1832.  
The Mayor,  
&c. of  
MACCLESFIELD  
v.  
PEDLEY.

1794. The plaintiffs appointed certain officers called *market-toters*. Those officers, who have been continued from 1794 to the present time, have by virtue of their office visited the market-place on market days (*a*), have inspected the meat brought there for sale, and have from time to time seized and destroyed meat which they adjudged to be unfit for food.

It was asserted by the defendant's witnesses, and denied by those called on the part of the plaintiffs, that previously to 1810 meat was usually sold in butchers' shops in the town, not being within the market.

The jury having found for the plaintiffs, a rule nisi was obtained for a new trial, on the ground of misdirection, first, in stating to the jury that the power of excluding persons from selling in private shops resulted from the right to the franchise of a market, unless the defendant could shew the contrary,—whereas such power of exclusion could only exist by immemorial custom; and, secondly, in not leaving it as a question for the jury whether any such immemorial custom existed.

The learned judge reported to the Court, that in his address to the jury he had not stated to them that the plaintiffs had the right contended for as incident to the franchise of the market, but that he had treated the right as one which could exist only by custom, and that he had left it to the jury, on the evidence, to say whether such exclusive right did or did not exist.

*J. Jervis* and *J. H. Lloyd*, in Trinity term, shewed

(*a*) Tuesdays and Saturdays.



1832.  
The Mayor,  
&c. of  
MACCLESFIELD  
v.  
PEDLEY.

cause (a), and cited *Mosley v. Walker* (b), and the *Prætor of Dunstable's* case (c):

*Campbell, Temple, and Tyrwhitt*, were heard in support of the rule.

*Cur. adv. vult.*

In Michaelmas term, 1832, the judgment of the Court was delivered by

LITTLEDALE, J. (d), who, after stating the pleadings and course of proceedings, proceeded as follows.

On the motion for a new trial it was objected that the learned judge had misdirected the jury, by stating that the right to exclude individuals from selling in private shops resulted from the right to the franchise of a market; unless the defendant could prove a custom to the contrary, whereas, by law, such right of exclusion could only exist by immemorial custom; and that the learned judge had not left to the jury the question, whether such an immemorial custom existed with respect to this market. Upon considering the report, and after conferring with the learned judge, we are of opinion that the objections urged in support of the motion for a new trial cannot be sustained. The learned judge never stated that the plaintiffs had the right contended for as incident to the franchise of the market. He treated this right as one which could exist only by virtue of immemorial usage, and that question, substantially, was left to the jury. There is no doubt that there was sufficient evidence to prove such a custom; for it clearly appeared, upon the testimony of several witnesses, that no butchers' shop existed in the town until of late years, and that when these shops were first opened, the plaintiffs objected to them. It was not material, in support

(a) Before Lord Tenterden, C.J., Littledale, Parke, and Taunton, JJ.

(b) 9 Dowl. & Ry. 868; 7 Barn.

& Cressw. 40.

(c) Cited in the City of London's case, 8 Co. Rep. 147.

(d) Lord Tenterden having died.

1832.

The Mayor,  
&c. of  
MACCLESFIELD  
v.  
PEDLEY.

of the custom contended for, to prove that this had been a corporation by prescription. The question was, whether this had been an immemorial market, and whether a custom had existed, from time immemorial, for the owner of the market to prevent private individuals from selling in shops out of the market. If it were so, and such custom existed, the market might have come into the hands of the plaintiffs, in modern times, by a grant from the crown or by conveyance from a subject, and the plaintiffs would have a right to enforce the custom. In this view of the case, it is unnecessary to give any opinion whether the grantee of a newly-created market could bring an action for the disturbance of his franchise against a person who did no more than sell in his own shop, not being within the limits of the market-place, marketable articles on the market days. It may, however, be observed, that no case has decided that this act, simply, is an injury to the market in point of law. But it is equally clear, on the other hand, that a custom to exclude all others from selling such commodities on the market days, except in the market-place, is valid in law. The like custom was supported in the case of the Manchester market, in *Mosley v. Walker* (a), which much resembles the present case. The Abbot of Westminster had formerly a similar privilege by custom, (as appears from the Gravesend case (b)), which privilege was sold to the city of London; and many analogous usages are to be found in the books, and exist in different places. Indeed, the validity of such a custom, if established, was not disputed on the argument. The rule must therefore be discharged.

Rule discharged (c).

(a) 9 Dowl. & Ry. 383; 7 Barn. & Cressw. 441; *Andrew Prince v. Lewis*, 8 Dowl. & Ry. 121; 5 Barn. & Cressw. 363.

(b) 2 Brownlow's Rep. 173.

(c) In the *Mayor, &c. of Devizes v. Clark*, Sanm. spring assizes,

1834, (*post*, vol. vi.) *Williams*, B. said that he should reserve the point whether a right to prohibit sale out of the market-place was incidental to an immemorial market. A rule nisi for a new trial was obtained E. T. 1834.

1832.

## The KING v. The Inhabitants of WROXTON (a).

A marriage by banns, published in false names, is not void under 4 Geo. 4, c. 76, s. 22, unless both parties were privy to such mispublication.

AN order of two justices, whereby *Susannah Carpenter*, called therein the wife of *James Carpenter*, was removed from the parish of Moreton Pinkney, in the county of Northampton, to the parish of Wroxtton, in the county of Oxford, was confirmed by the Court of Quarter Sessions, on appeal, subject to the opinion of this Court on the following case:—

*James Carpenter*, the reputed husband of the pauper, is legally settled in Wroxtton. In 1829 he courted the pauper, then *Susannah Spencer*, who was living in service at Kennington, near London, and she consented to marry him. He knew her name, and told her that he would see the banns properly published. She took no steps in the matter. He told her that the banns had been published. The marriage took place at Kennington, on the 8th of October, 1829. The banns had been published in the names of *James Carpenter* and *Agnes Watts* (b). The register contained an entry of the 8th of October, 1829, of the marriage of *James Carpenter* and *Agnes Watts* by banns; and the parish clerk, who attested the register, identified the pauper as the woman married under the name of *Agnes Watts*. The pauper had never gone by the name of *Agnes Watts*. In the marriage service, the clergyman used the name of *Agnes*, but no surname. The pauper who till then believed that she was about to be married in her own name, looked at *Carpenter*, who told her to hold her tongue. The ceremony then proceeded. The clergyman wrote the name of *Agnes Watts* in the register; and the pauper, although she could write, was so frightened and confused, that she only made her mark under the name of *Agnes Watts*. On com-

(a) This case was argued and determined in Easter term, 1833.

(b) It does not appear whether

the object of this mispublication of banns was to conceal the marriage, or to avoid it.

ing out of church, she told *Carpenter* that he had married her by a wrong name, and he said it would stand good, and that the banns had been published in the names of *James Carpenter* and *Agnes Watts*, but that it would save expense. Before he said this, the pauper did not know that the banns had been published in a wrong name. *Carpenter* then scratched the name of *Agnes Watts* out of the certificate, and inserted that of *Susannah Carpenter*.

1832.

The King  
v.Inhabitants of  
WROXTON.

*Waddington* and *Reynolds* in support of the order of sessions. Under the present marriage act, 4 Geo. 4, c. 76, this marriage is valid. It is conceded that under the former act, 26 Geo. 2, c. 33, the marriage would have been invalid if both parties had been cognizant of the change of name. There is a material difference in the language of the two acts. The second section of 26 Geo. 2, c. 33, enacted, that no person should be obliged to publish banns of matrimony unless the persons to be married should, seven days at least before the time required for the first publication of such banns, deliver a notice in writing of their true christian and surnames. The eighth section declared all marriages solemnized without publication of banns or licence, void. The 22d section of 4 Geo. 4, c. 76, enacted, that if any persons should knowingly and wilfully intermarry without due publication of banns, the marriage of such persons should be null and void. In *Wiltshire v. Prince* (a) the distinction was most clearly drawn by Dr. *Lushington* between the two cases. The publication of banns is usually intrusted to the intended husband, and if it be held that the marriage is invalid, the consequence will be that the husband may by his own fraudulent act avoid the contract. It was to prevent this that the present marriage act was passed.

It has been held, that the marriage acts being in restraint of the right of marriage, are to be construed strictly, *Hodg-*

(a) 3 Hagg. Eccl. Rep. 334.

1832.  
  
 The King  
 v.  
 Inhabitants of  
 Walsworth.

*kinson v. Wilkin* (a); *Dalrymple v. Dalrymple* (b). In order to render the marriage invalid, the parties are "knowingly and wilfully" to intermarry without due publication of banns. If, therefore, a strict construction be adopted, it cannot be said that *Susannah Carpenter* knowingly married in a false name. To come within the terms of the section, it is necessary that each party should be aware that the marriage is in a wrong name. The 9th *Anno*, c. 10, imposes a penalty on a postmaster wittingly, willingly and knowingly detaining letters. The Court held that a penalty under this act was not incurred where a postmaster delivered letters to an assignee addressed to a bankrupt *bonâ fide* believing that the assignee was entitled to have them, *Micrelles v. Banning* (c). In this case, *Susannah Carpenter* did not know that the banns had been published in a false name until after the marriage was solemnized. The 23d section assumes that a marriage may be valid where one of the parties knew that the banns had not been duly published; that section enacts, "if any valid marriage shall be procured by a party thereto to be solemnized by banns between persons, one or both of whom shall be under the age of twenty-one years, not being a widower or widow, such party knowing that such person under the age of twenty-one years had a parent or guardian then living, and that such marriage was had without the consent of such parent or guardian, and knowing that banns had not been duly published according to the provisions of this act, and having knowingly caused and procured the undue publication of banns, then it shall be lawful for the attorney-general to sue for a forfeiture of all estate, &c. which hath accrued or shall accrue to the party so offending by force of such marriage." The 23d section speaks of "persons who should knowingly" intermarry. This use of the plural number imports, that to make the marriage void both parties should be aware of the fraud. When the statute is intended to

(a) 1 Hagg. Conist. Rep. 262.

(b) *Dalrymple's case*, by Dod-

son, *passim*.

(c) 2 Barn. & Adol. 909.

apply to the acts of either of the parties individually, it is so expressed, as in sections 7 and 14.

*Dunne* and *Humfrey* contra. The question undoubtedly arises on the 22d section of 4 Geo. 4, c. 76; and to invalidate a marriage two circumstances must concur:—first, absence of due publication of the banns; and secondly, intermarriage with a knowledge of that fact.

The act of 26 Geo. 2 is only a confirmation of the previous law. Before that statute it was necessary to give notice on three holydays. By a series of decisions on 26 Geo. 2, c. 33, it is established, that the banns must be published in the proper names of the parties, acquired either by baptism or by reputation. Notoriety was the object of the act, and that object has been entirely frustrated in this case. Section 7 shews the intention of the legislature. It requires the parties, seven days at least before the time appointed for the publication of the banns, respectively to deliver notice in writing of their true Christian names and surnames. The authorities on the construction of 26 Geo. 2, c. 33, are collected in *Rex v. Billingham* (a), and are classified by Lord Tenterden in *Rex v. Tibshelf* (b). The result of the cases is, that where the banns are published in a name or names totally different from those which the parties, or one of them, ever used, or by which they or he or she were ever known, the marriage founded upon that publication is invalid; but if there be a partial variation of name only, as the alteration of a letter or letters, or the addition or suppression of one Christian name, the publication may or may not be void; the supposed misdescription may be explained, and it becomes the subject of inquiry, whether it was consistent with honesty of purpose, or arose from a fraudulent intention. In this case the name of the woman is entirely different, and the publication in a false name is no publication.

Then as to the question whether the parties did knowingly

1832.  
The King  
v.  
Inhabitants of  
Worcester.

First point:  
Insufficient  
publication.

Second point:  
Scienter.

(a) 3 Maule & Selw. 250.

(b) 1 Barn. & Adol. 190.

1832.  
  
 The King  
 v.  
 Inhabitants of  
 Wokingham.

*and wilfully* intermarry without due publication of banns? The test of this is the conduct of each party at the time of the marriage. The object of the man clearly was to elude the statute. It is avowed by the man that his motive was to save expense. But it is said, that the words in the 22d section are in the plural, and it is necessary that both persons should knowingly intermarry. By section 71 it is enacted, that no person shall be obliged to publish the banns of matrimony between any persons whatsoever, unless the persons to be married shall, seven days at the least before the time required for the first publication of such banns, respectively deliver to such person a notice in writing, dated on the day on which the same shall be so delivered, of their true Christian and surnames, and of the house or houses of their respective abodes within such parish, and of the time during which they have dwelt, inhabited, or lodged in such house or houses respectively. The word "persons," in this section must mean either of the parties, not both; and there is therefore no reason why a similar interpretation should not be put on the section in question. But even with respect to the woman, as soon as the clergyman addressed her by the name of *Agnes*, she must have known that she was not called by her right name, and that there had been a false description of her. Her attention was drawn to the false description during the ceremony; as soon as it was over, she said to her husband, you have married me by a wrong name. She afterwards put her mark to the register, although she could write.

*Cur. adv. vult.*

DENMAN, C. J. delivered the judgment of the Court.

In this case the sessions confirmed an order for the removal of *Susannah Carpenter* as the wife of *James Carpenter*. The question was, whether she was his wife, and turned upon the 22d section of 4 Geo. 4, c. 76, the marriage act in force in 1829, when the ceremony was performed. The case stated that *James Carpenter* prevailed upon *Su-*

~~James~~ Spencer to marry him, and told her he would see the banns properly published, and afterwards that they had been published, and that she took no steps in the matter. He, however, procured the banns to be published in the names of *James Carpenter* and *Agnes Watts*, which latter name the pauper had never borne. In performing the service, the clergyman applied to her the name of *Agnes*, till which time she believed that she was about to be married by her own name, and she did not know, until after the marriage, that the banns had been published in a wrong name. The facts above related are the only material ones in the case. To shew the marriage void, the case of *Rex v. Tibshelley*(a), decided in this Court in Trinity term 1830, was relied upon. That case was decided under the 26th Geo. 2, c. 33, which by section 3 provides that all marriages that shall be solemnized without publication of banns or licence, shall be null and void to all intents and purposes whatsoever. And in a series of decisions on that statute, founded on a reference to the second section, it was held, that the banns were to be published in the true names of the parties, otherwise it was no publication at all.

The words of the present act are wholly, and, we must presume, advisedly, different. The only clause avoiding a marriage for want of banns is the 22d, which enacts, that if any persons shall *knowingly and wilfully* intermarry without due publication of banns, or a licence first had and obtained, the marriages of such persons shall be null and void to all intents and purposes whatsoever.

We are of opinion, that in order to invalidate a marriage under this enactment, it must be contracted by *both* parties with a *knowledge* that no due publication of the banns had taken place. Now the sessions have here negatived such knowledge on the part of the pauper.

The only decision which is reported on the effect of this section, is that of the case of *Wiltshire v. Prince*, otherwise

1832.  
The King  
v.  
Inhabitants of  
Wootton.

(a) 1 Barn. & Adol. 190.



1833.

The King  
v.  
Inhabitants of  
Worcester.

*Wiltshire (a)*, in which Dr. Lushington expressly founded his judgment of nullity on the fact, that both the man and the woman were aware that the banns had been published in a manner calculated to conceal the identity of one of the parties. We therefore think the marriage valid, and confirm the order.

Order of Sessions confirmed.

(a) 3 Hagg. Eccl. Rep. 332.

The KING v. BATEMAN and HART, Justices of  
FOLKSTONE (a).

To entitle a party who has sustained damages under 30*l.* by the felonious act of rioters, to require, under 7 & 8 *Geo.* 4, c. 31, s. 8, the holding of a petty sessions for hearing and determining his claim for compensation, it must appear that within seven days after the commission of the offence he went before a justice of the peace, and that he has complied with all the other requisites of the third section.

In the absence of an affidavit verifying these facts (in general terms,) the Court will not

A Rule nisi had been obtained for a mandamus, to the defendants to appoint a special session, pursuant to 7 & 8 *Geo.* 4, c. 31, s. 8, to hear and determine the claim of *Clark Towsey*, for damage occasioned by his house being partly destroyed by rioters. The damage sustained by *Towsey* was under 30*l.*, and five days after the attack upon the house, notice in writing, that he intended to claim compensation, was served by *Towsey* upon the constable of Folkstone. This notice required the constable, within seven days of the receipt of the notice, to exhibit the same to two justices of Folkstone, that they might appoint a time and place for holding a special session to determine the claim. The same notice had also been served upon the defendants; but they had not held a special session to dispose of the claim. These circumstances were stated in *Towsey's* affidavit.

Sir James Scarlett shewed cause. By the third section, no summary proceeding is maintainable unless the person damnified shall, within seven days after the commission of the offence, go before some justice, state upon oath the

(a) This case was heard and determined in Hilary term, 1833.

grant a mandamus for the holding of a petty sessions for such purpose.

names of the offenders, if known, submit to the examination of such justice touching the circumstances of the offence, and become bound by recognizance to prosecute the offenders when apprehended. It does not appear that the applicant has done that which is required by this section.

1832.  
The King  
v.  
Justices of  
Peckerswell.

*Platt*, in support of the rule. The applicant has complied with the terms of the *eighth* section. Assuming that it is necessary to comply with the requisitions of the *third* section, that will form an objection to the hearing of the claim when the party comes before the petty sessions. The application at present is, that the Court may cause a Court of Petty Sessions to be held, that the party may there establish his claim, if entitled by law. It is possible that the party may have complied with the requisitions of the third section. If that section has not been pursued, that may be returned to the mandamus. [*Littledale, J.* Why are we to desire the magistrates to meet, when it is not stated to us that all the requisites of the statute have been complied with?] If the Court refuse a mandamus the party has no remedy.

By the COURT.—We will enlarge the rule until next term, to give the party an opportunity of making an affidavit that the requisites of the statute have been complied with.

In the following term, no further affidavit having been made,

Rule discharged, with costs (a).

(a) See further, as to proceedings upon the statute, 1 & 3 Geo. 4, c. 31, *Wells v. The Hundred of East Worsford*, 4 Mann. & Ryl.

130, 9 Barn. & Cressw. 134; *The Duke of Newcastle v. The Hundred of Brantome*, ante, 601.

1832.

## EMPSON v. SODEN and another (a).

Tenant for years of a garden has no right to remove a border of box planted by himself.

**TROVER** for a cart-load of box and 1000 plants of box. Plea: the general issue. At the trial before *Denman*, C. J., at the Warwick spring assizes, 1833, the following facts appeared:

Tenant for years of a house and garden planted some box as a border to a walk, and previously to the expiration of the tenancy sold the box to the plaintiff, who, after the expiration of the tenancy, entered the garden for the purpose of taking up the box, and dug up some plants, which he was prevented from carrying away by the incoming tenant, one of the defendants. Some evidence was given to shew that the outgoing tenant had permission from the incoming tenant to leave the box in the ground until it could conveniently be removed. The learned Chief Justice nonsuited the plaintiff, giving him leave to move to enter a verdict, with one shilling damages.

*Humfrey* now moved on behalf of the plaintiff accordingly. The case turned upon the question, whether box planted by the tenant could be removed by him during the term. In *Co. Litt. (b)* it is said, "If the tenant cut down or destroy any fruit trees growing in the garden or orchard, it is waste." The severity of the old law on this subject has been much relaxed, and every modern case has departed further from the ancient rule; *Grymes v. Boweren (c)*. In *Amos and Ferard on Fixtures (d)*, the result and the principle of the modern cases is thus stated: "that a tenant is entitled to take away certain things which he has, at his own expense, affixed to the demised premises, for the purpose of ornament and furniture." And the principle on

(a) This case was heard and determined in Easter term, 1833.

(b) 53 a, citing "T. 7 H. 6, fo. 38, pl. 47; M. 44 E. 3, fo. 44, pl. 52," and (in Hargrave's note,) "M. 14 H. 4, fo. 12, pl. 11, (which

however relates to waste committed in houses only,) Hal. MSS." And see 3 Tho. Co. Litt. 235.

(c) 6 Bingh. 437; 4 Moore & Payne, 143.

(d) Page 77.

which this rule is founded appears to be, that as annexations of this nature must generally be designed for temporary purposes only, it would greatly incommode tenants in the enjoyment of their estates, if by every slight attachment to the freehold the property should be immediately changed and pass over to the reversioner." [Parke, J. It might as well be contended that a tenant could take up hedges(a).]

1832.

EMPSON  
v.  
SIMPSON.

By the COURT.—We cannot grant a rule.

Rule refused.

(a) "If there be a quickset hedge of white thorn, if the tenant stub it up or suffer it to be destroyed, this is destruction," Co. Litt. 53 a, citing T. 46 E. 3, fo. 17, pl. 13, (waste in cutting white and black thorns generally, without reference to hedges); T. 9 H. 6, fo. 10, pl. 29, (which is contra, the writ of waste being there held good for oaks and bad for thorns); and 12 H. 8, fo. 1, pl. 1, (a case of timber trees).

DICKENSON v. NAULE.

ASSUMPSIT for goods sold and delivered. Plea: non assumpsit. At the trial before Denman, C. J., at the last spring assizes for the county of Lincoln, the following facts appeared:

The plaintiff, an auctioneer, by the direction of Mrs. Anne Court, sold goods by auction to the defendant, who was about to take them away, when the plaintiff objected to their removal without payment. Upon this the defendant promised the plaintiff to pay for the goods as soon as the bill was made out. The plaintiff's employer had been married to Court, and had lived with him as his wife, in ignorance that at the time her marriage with him took place, Court was the husband of another woman. Court by his will had bequeathed his goods "to his wife Anne," and appointed her his executrix. This will the plaintiff's

4. having proved the will of B., in which she supposed herself to be appointed executrix, employs C., an auctioneer, to sell the goods of B. They are sold to D., who, as an inducement to C. to let him remove the goods without payment, expressly promises to pay C. as soon as the bill shall be made out. Probate is afterwards granted to E., the real executrix, who gives notice to D. not to pay the price to C. Notwithstanding the express promise, C. cannot sue D. for the price.

1833.  
  
 DICKENSON  
 v.  
 NAULE.

employer had proved as executrix. At a considerable period after the sale had elapsed, it was discovered that *Court* had a former wife living of the name of *Anne*. The first wife obtained probate of the will and gave notice to the defendant to pay the price of the goods to her. The defendant paid *St. 1s.* into Court, on account of the auction duty. The Lord Chief Justice nonsuited the plaintiff, but gave him leave to move to enter a verdict for the price of the goods.

*Humfrey* now moved accordingly. The auctioneer may maintain this action, although when he receives the purchase money he may perhaps be considered as holding it for the benefit of the party who now appears to be the lawful executrix; *Williams v. Millington*(a); *Coppin v. Walker*(b). In *Coppin v. Craig*(c), the Court intimated a doubt, whether an action did not accrue to the auctioneer, who had a lien as well on the proceeds of the sale as on the specific article, upon an implied promise of the defendant to pay him the price, in consideration of his foregoing his lien and delivering the goods without payment, in analogy to the cases decided on the delivery of goods by the master of a ship without payment of freight(d). Here there was an *express* promise to the auctioneer to pay him the price of the goods. Besides the auction duty, which was paid into Court, the auctioneer had a lien for his commission. [*Parke, J.* Were the goods sold as the goods of the executrix of *Court*?] No particulars of sale were produced at the trial. A contract with the auctioneer will be implied from the circumstance of the purchaser having taken away the goods without paying for them; *Cock v. Taylor*(e). In *Brown v. Staton*(f) it was held, that an auctioneer who delivered goods without receiving the price of them, was liable for not paying over the price to the owner. Injustice may

(a) 1 H. Bla. 81.

(b) 7 Taunt. 237.

(c) Ibid. 243.

(d) Abbott, L. S. 5th ed. 285.

(e) 13 East, 399.

(f) 2 Chitty's Rep. 353.

therefore be done to the plaintiff, if he is not allowed to recover in this action.

*Cur. adv. vult.*

1838.  
  
 DICKENSON  
 v.  
 NAULÉ.

DENMAN, C. J., during the term (a), delivered the judgment of the Court.

We are of opinion that no rule should be granted. The action was brought for the price of goods, by an auctioneer employed by a supposed executrix named *Anne Court*, to sell the property of the testator as the goods of the executrix; but before the goods were paid for it appeared that another person was the real executrix (b), who gave notice to the defendant of that fact, and claimed payment of the money. For the plaintiff, it was contended that an auctioneer has a right of action for goods sold by him in the course of his business. And undoubtedly the auctioneer may sue where the right of no third person has intervened. But where such right is established, and the person employing the auctioneer is proved *not* to have been the owner, it then becomes clear that the auctioneer, (who can have no interest in the goods but what he derives from his employer,) has no longer any claim upon the property against the right owner. The defendant was therefore justified in withholding payment to the agent of the supposed executrix, after having received notice of the title of the real executrix, to whom he is certainly liable.

Rule refused.

(a) Easter term, 1838.

(b) Evidence was offered at the trial for the purpose of shewing that the wife de facto was the person whom the testator intended to make his executrix and residuary

legatee; but this evidence was rejected. And see *Hampshire v. Pierce*, 2 Vez. sen. 216; *Parsons v. Parsons*, 1 Ves. jun. 266; *Smith v. Coney*, 6 Ves. jun. 42; *Thomas v. Thomas*, 6 T. R. 671.

1833.

WOODBIDGE, Assignee of PARKER, and AYER and others  
Assignees of ELLIS, v. SWANN and others.

*A.*, after the bankruptcy of his partner *B.*, believing the firm to be solvent, pays in partnership money to *C.* their banker, to meet their current engagements, and the money is so applied.

*A.* afterwards becomes bankrupt. This payment is valid, and *C.* is not liable for the amount to the assignees of *B.* and of *A.*

*A.*, whilst solvent, and the assignees of *B.*, opened a new account with *C.*, and paid in money to discharge an old debt, which money was so applied. The assignees of *B.* and of *A.* cannot recover the amount from *C.*

**ASSUMPSIT**, for money had and received. Plea: non assumpsit, with notice of set-off. At the trial before *Denman*, C. J. at the London sittings after last term, it appeared that the action was brought to recover two sums of 900*l.* each, under the following circumstances:—

*Ellis* and *Parker* were in partnership together as wine-merchants, and kept an account with the defendants, who were bankers at York. On the 22d of March, 1827, a commission of bankrupt issued against *Ellis*; at which time a balance was due to the defendants of 2482*l.* from the firm of *Ellis* and *Parker*. After *Ellis*'s bankruptcy, *Parker*, who continued to carry on the trade under the old firm, believing that firm to be solvent, paid into the bank of the defendants 900*l.* part of the partnership funds, to be applied by the defendants in payment of running bills of *Ellis* and *Parker* payable at the defendants' bank. 900*l.* was applied accordingly. This was the first sum of 900*l.* Shortly after the bankruptcy of *Ellis*, it was arranged by his assignees and *Parker*, that the outstanding debts of *Ellis* and *Parker* should be got in and paid into the defendants' bank to a new account, opened by the defendants with *Parker* and the assignees of *Ellis* jointly, and that the amount so paid in should, when *Ellis*'s assignees and *Parker* should so direct, be transferred to the credit of *Ellis* and *Parker*'s account with the defendants. *Parker* subsequently obtained the consent of the assignees to the transfer of the sum of 900*l.*; which was accordingly transferred. This was the second sum of 900*l.* On the 15th May, 1829, *Parker* became bankrupt. The learned chief justice was of opinion that the plaintiffs were not entitled to recover either of the sums of 900*l.*; and he directed the jury to find a verdict for the defendants, but gave the plaintiffs leave to move to enter a verdict for the two sums of 900*l.* or either of them.

Sir *James Scarlett* now moved accordingly. With respect to the first 900*l.*, the question arises, whether a solvent partner can dispose of the partnership property, after the bankruptcy of his co-partner, without the consent of the assignees of the latter. *Harvey v. Crickett* (a) was cited at the trial in affirmance of that position; but in *Wait, in re* (b), Lord *Eldon*, C. decided the contrary. With reference to an execution by a separate creditor of one partner against the effects of the firm, the Chancellor says, "that it always appeared to him that the interest of the individual partner was all that a creditor of that individual could take, and that he must take it subject to all the partnership dealings." With reference to the interest remaining in one partner, after an act of bankruptcy by the other, Lord *Eldon* says, "if there is a partnership of *A.* and *B.*, the moment an act of bankruptcy is committed by one of them, (*A.* for example,) if a commission is issued on that day, or one is afterwards taken out which has effect from that time,—from that moment the partnership is put an end to. The question then is, what is the property of the insolvent partner *A.*, and what is the property of the solvent partner *B.*? *A.* may have no interest in the joint effects; no property at all; I mean, they may have no separate or respective interests; because, until the whole demands of both *A.* and *B.* are settled, you cannot say whether anything remains to be divided; and that must depend, not only on the demands against both, but on the demands which they may have against each other." In *Ramsbottom v. Lewis* (c) it was held, that "after a secret act of bankruptcy committed by one of two partners, the other cannot, by indorsement in the name of the firm, transfer negotiable securities which existed before the act of bankruptcy;" *Abel v. Sutton* (d). The result of these cases is, that a solvent partner, after the bankruptcy of his co-partner, cannot dispose of the partnership funds. [*Parke, J.* Yet the solvent partner is liable to pay

1835.

WOODBRIDGE

v.

SWANN.

First sum.


(a) 5 Maule &amp; Selw. 336.

(c) 1 Campb. 279.

(b) 1 Jac. &amp; Walk. 605.

(d) 3 Esp. N. P. C. 106.



1838.  
  
 WOODBRIDGE  
 v.  
 SWANN.

the partnership debts. In *Wait, in re*, Lord Eldon is considering the equitable rights of the partners. According to the argument now urged, if an opulent firm had an insolvent partner, no transfer of the partnership funds could be made.] A solvent partner has no right to appropriate the joint funds, unless there be sufficient to pay all the creditors of the firm. The policy of the bankrupt law is to distribute the property equally amongst the creditors; and *Parker* had no right to frustrate that object and apply the partnership property in favour of one of the creditors.

Second sum.

With respect to the latter sum of 900*l.*, the bankers were aware that it had been paid into their hands for the purpose of making an equal distribution among the creditors; and knowing that, they were not justified in applying it in any other manner; *Stewart v. Lee (a)*.

*Cur. adv. vult.*

DENMAN, C. J. (*b*) delivered the judgment of the Court. After stating the facts of the case, his lordship proceeded as follows.

First sum.

It is quite clear that *Ellis's* share of the joint effects was transferred to his assignees by relation to his act of bankruptcy; and it is equally clear that *Parker's* share remained in himself after the bankruptcy of *Ellis*. The assignees and the solvent partner were therefore tenants in common of all the partnership funds. It follows, that those who claim under the solvent partner are in the same situation; and, according to *Harvey v. Crickett (c)*, it makes no difference whether, at the time of acquiring the interest of the solvent partner, the party claiming under him had notice of the bankruptcy or not. In that case all the previous decisions were considered; and the result of them is, that a creditor of the firm who is paid, fairly and without any contemplation of bankruptcy, by the solvent partner, after the bankruptcy of another partner, has a good defence at law

(a) 1 Mood. & Malk. 158.

determined in Easter term, 1835.

(b) This case was argued and

(c) 5 Maule & Selw. 336.

to an action brought by the assignees of the bankrupt partner and by the solvent partner himself.

It was however urged that *In re Wait* (a), decided by Lord Eldon, was a subsequent authority to the contrary; and if, upon referring to that case, we had thought that it had thrown any doubt upon the previous decisions in courts of law upon this subject, we certainly should have granted a rule, with a view to the reconsideration of so important a question. But we are clearly of opinion that the authority of those cases is left untouched. The chancellor, sitting in bankruptcy, exercises both a legal and an equitable jurisdiction; and in the case cited, and in that of *Dutton v. Morrison* (b), Lord Eldon is considering the equitable rights of the assignees of the bankrupt partner, representing the general creditors.

Whether the assignees of *Ellis*, for the purpose of paying the general creditors, have, in this particular case, any equitable claims against the defendants for the money which has been paid to them fairly and honestly, and in the course of business, by the solvent partner, is a question which it does not belong to a court of law to decide.

With respect to the latter sum of 900*l.*, which was paid with the full consent of *Parker* and of the assignees of *Ellis*, and without the least suspicion of fraud, there is not any question; as it is quite clear that the assignees of *Ellis*, and *Parker* before his bankruptcy, could not have recovered it back; and it is equally clear that the assignees of both have no right to sue for it. We therefore refuse the rule.

Rule refused.

(a) 1 Jac. & Walk. 605.

(b) 17 Ves. 194.

1833.  
WOODBRIDGE  
v.  
SWANN.

1833.

BARRON, Gent. one &amp;c. v. HUSBAND, Gent. one &amp;c.

The assignees of a bankrupt gave B., their solicitor, a check for the amount of the bill of costs of A. the petitioning creditor (who was his own solicitor). B. offers to pay A. the full amount of these costs, provided A. will engage in the receipt that the costs shall be afterwards liable to taxation. A. refuses to give such engagement, and requests B. to pay out of the amount some commissioners' fees included in the bill. No promise arises upon the offer, the terms of which were not acceded to; and without the promise there is no privity of contract to support an action for money had and received.

**ASSUMPSIT**, for money had and received, &c. Plea: non-assumpsit. At the trial before *Parke, J.* at the Devon spring assizes, 1833, the following facts appeared:

1817. The plaintiff (a solicitor), as petitioning creditor, sued out a commission of bankrupt against one *Birdwood*. His bill of costs against the estate was, previously to the choice of assignees, 194*l.* 16*s.* 7*d.*; and payments had been made to him by the assignees of 90*l.* which left a balance of 104*l.* 16*s.* 7*d.* For fourteen years the commission was not further proceeded in, after which the surviving assignees appointed the defendant their solicitor.

17 June, 1831. An audit was held before the commissioners, at which the assignees were proceeding to pass their accounts, taking credit for the balance due to the plaintiff, when the commissioners required an order to be given for the payment of the plaintiff's bill of costs, before they would complete the audit. A check was therefore given to the defendant by the assignees for 104*l.* 16*s.* 7*d.* that he might pay the plaintiff's bill; which he engaged to do. The defendant accordingly had an interview with the plaintiff, and offered to pay him the money, provided he would give a receipt with an agreement that the costs should be subject to further revision or taxation, if required. This the plaintiff refused to do. The balance of 104*l.* 16*s.* 7*d.*, included some fees due to one of the commissioners, which, subsequently to the above interview, were paid by the defendant to the commissioner, under an order from the plaintiff. It was not shewn that the commissioners had ascertained the amount of costs, according to 5 *Geo.* 2, c. 30, s. 25, and 6 *Geo.* 4, c. 16, s. 14. The learned judge nonsuited the plaintiff, saying, that the commissioners should have ascertained the amount of the costs.

*Coleridge, Serjt.* now moved to set aside the nonsuit, and for a rule nisi for a new trial. The 5 *Geo.* 2, c. 30, (the

bankrupt act in force when these transactions took place), by s. 25, required that the petitioning creditor should prosecute the commission at his own costs, until assignees should have been chosen, and that the commissioners, at the meeting appointed for the choice of assignees, should ascertain such costs, and, by writing under their hands, order the assignees to repay the petitioning creditor his costs out of the first moneys that should be collected by them under the commission. Assuming that the omission by the commissioners to ascertain the amount of costs might be a defence to an action brought by the solicitor against the petitioning creditor, it is not an answer to an action for money had and received by the defendant for the plaintiff's use. [*Parke, J.* My doubt is, whether money had and received is maintainable here. The proof is, that the defendant offered to pay the plaintiff the amount of the check, on a condition which the latter refused to comply with. It does not appear that there was any previous agreement between them, that the defendant should receive the money from the assignees for the plaintiff's use. The defendant treated the money as belonging to the plaintiff, since he took *his* authority to pay the commissioners' fees. If I give money to my servant to pay a tradesman, can the latter maintain an action for money had and received against the servant? (a)] That is a similar case; except that the defendant, by a disposition of part of the money pursuant to the plaintiff's order, clearly agreed to hold it to the plaintiff's use.

*Cur. adv. vult.*

DENMAN, C. J. delivered the judgment of the Court (b). After stating the evidence his lordship proceeded:—

(a) F. N. B. 119, B., D.; 2 Inst. 379; *Wagstaffe v. Bedford*, 1 Vern. 95; *Anon.* ib. 136; *Potts v. Potts*, ib. 208; *Evans v. Birch*, 3 Campb. 10; *Braddick v. Croad*, Mann. N. P. D. 2d ed. 206; *Grylls v. Davies*,

2 Barn. & Adol. 514; *Stephens v. Badcock*, 3 Barn. & Adol. 354; Com. Dig. *Accompt*, (A. 1) (D.); *Howell v. Batt*, *post*, vol. ii. 381.

(b) This case was argued and determined in Easter term, 1833.

1833.

BARRON  
v.  
HUSBAND.

Taxation of  
petitioning  
creditor's  
costs.

1833.

BARRON  
v.  
HUSBAND.Taxation of  
petitioning  
creditor's  
costs.

It may be taken that the defendant had received cash for the check. The nonsuit proceeded on the ground that the plaintiff had no right to sue for the amount until his bill had been taxed under 6 Geo. 4. c. 16, s. 14. It was contended by my brother *Coleridge*, upon a motion for a rule nisi to set aside the nonsuit, that the learned judge was wrong in this respect, and that taxation of the bill was not requisite, if the assignees chose to waive it. It is not necessary for us to pronounce any opinion upon this question; because, admitting that the bill need not have been taxed, we are of opinion that this action will not lie, for want of privity between the plaintiff and defendant.

The defendant received the money as the agent of the assignees, and not as the agent of the plaintiff; he held it subject to their control and direction, and would continue to be accountable to them, until he entered into some binding engagement with the plaintiff to hold it for *his* use. As soon as that engagement was entered into, and not until then, he would hold the money for the plaintiff's use. This is the doctrine laid down in *Williams v. Everett* (a), *Wharton v. Walker* (b), *Scott v. Porcher* (c), *Wedlake v. Hurley* (d), and acted upon in many other cases.

In this case there has been no such engagement. The defendant never promised to pay the plaintiff, except upon a condition to which he would not assent, namely, that his bill should undergo a subsequent taxation; and his part-payment, by the payment, by the direction of the plaintiff, of the commissioners' fees, cannot operate, except as part-payment. For these reasons we are of opinion that the nonsuit was right.

Rule refused.

(a) 14 East, 582.

(a) 3 Mer. 652.

(b) 6 Dowl. & Ryl. 288; 4 Barn.  
& Cressw. 163.

(d) 1 Crompt. &amp; Jarvis, 83.

1833.

CHAUVEL v. CHIMELLI.

A RULE had been obtained in this cause, calling upon the attorneys of the plaintiff to shew cause why they should not pay to the attorneys of the defendant 119*l.* the taxed costs in the cause, pursuant to their undertaking. The plaintiff lived abroad, and the plaintiff's attorneys had given to the defendant's attorneys a written undertaking to pay the costs if a verdict should be found for the defendant. At the sittings at Guildhall after Trinity term, the defendant obtained a verdict. On the 15th November final judgment was entered up, but in the interval between the sittings and the entering up judgment the defendant had died. The defendant's attorneys called upon the plaintiff's attorneys to pay the costs, which they refused to do, unless a scire facias were sued out by the defendant's representatives as an authority to them to pay the money.

The plaintiff's attorneys gave the defendant's attorneys an undertaking to pay the costs in the event of the defendant's obtaining a verdict. The defendant obtained a verdict and died; and judgment was entered up within two terms. Held, that the plaintiff's attorneys were liable to pay the costs, although no scire facias had been sued out by the personal representatives.

Sir J. Scarlett shewed cause. F. Pollock was heard in support of the rule.

*Per Curiam.*—No scire facias was necessary.

Rule absolute.

DOE dem. STANSBURY v. ARKWRIGHT.

EJECTMENT, for twenty-five acres of coppice, called Walton's Coppice, in the county of Hereford. At the trial before Parke, J., at the Hereford spring assizes, 1833, it appeared that the lessor of the plaintiff claimed as issue in tail, under a remainder in tail created by the will of Thomas Stansbury, the brother of his great-grandfather Samuel Stansbury, to whom a prior life estate was limited. Thomas Stansbury died in 1777, and Samuel in 1793, having lived and died at Peckham. The lessor of the plaintiff, being unable to prove any acts of ownership by any of the entailees, offered in evidence the will of Thomas

Land-tax assessments are not evidence of seisin where it is shewn to be usual to retain the name of deceased proprietors on the books until the estate is sold to a different family.

1833.

DOR  
v.

ARKWRIGHT.

*Stansbury*, by which the property was described as Walton's Coppice, and certain land-tax assessments (a), in which Walton's Coppice was assessed. In 1783 and 1791 the assessments were in the name of "*Thomas Stansbury*." In 1794, and subsequently, until the death of the donee in tail, (ancestor of the lessor of the plaintiff,) in the name of "*Mr. Stansbury*." The clerk of the peace, by whom the assessment-books were produced, proved that it was usual not to alter the name in the books as long as the property continued in the possession of the same family, but that upon the property coming to another family, the assessments were changed. It was proved also that no other family of the name of *Stansbury* had possessed land in the neighbourhood. The learned judge was of opinion that these documents were not evidence of seisin by the lessor of the plaintiff's ancestors, and nonsuited the plaintiff, reserving leave to set aside the nonsuit, and enter a verdict, subject to a special case.

*Talfourd*, Serjt., now moved accordingly. The question is, whether there was evidence from which a jury could presume seisin. There can be no doubt as to the identity of the property. The land-tax assessments, though in a measure ex parte, are public documents, to which all parties may have access, and errors in which all parties may take steps to correct; *Rex v. King and others, Commissioners of Land-tax* (b). There, *Ashhurst*, J., in delivering his opinion, said, "The assessments of land-tax are public proceedings; every person is entitled to take copies:" and he said also, "If an application be made to the Court for an information against the commissioners, we will admit an attested copy of the assessment instead of the original." In *Doe d. Smith v. Cartwright* (c), in order to prove that a house was, about the year 1770, in the occupation of one *Young*, entries in the land-tax collector's books, stating

(a) *Vide ante*, 603.(c) *Ryan & Moody*, 62.

(b) 2 T. R. 234.

1833.

DOE  
v.

ABERWRIGHT.

*Young* to be rated for the house in question, and the payment by him of the sum at which he was rated, were offered in evidence, and admitted by *Abbott, C. J.* This is certainly not a very strong authority in favour of the plaintiff, but it is the only case at all bearing upon the point. The admissibility of these documents was not denied at the trial. [*Parke, J.* There is no objection to the receipt of them. The question is, whether they are any evidence of title.] By 38 *Geo. 3, c. 5, s. 41*, a power is given to the commissioners of land-tax to cut wood, where assessments have been made upon woodlands, and the rate is not paid. It must be presumed, therefore, that during so long a space of time they did their duty, and that they were regularly paid. [*Parke, J.* The presumption is, they were paid by somebody: it is immaterial to them who pays.] It must be presumed that the owners of the land are assessed, and that the rate is paid by them; 38 *Geo. 3, c. 5 (a)*. If the practice of conveyancers (*b*) may be referred to, it is to be observed that they are in the constant habit of receiving the assessments as evidence of title. [*Littledale, J.* Suppose these facts had been mentioned in a survey made under an act of parliament, would they not be evidence?] It is presumed that they would be so. Indeed, Domesday Book is received in evidence as a survey made by the authority of the state. This assessment is made under an

(a) And see the election acts 18 *Geo. 3, c. 17*; 30 *Geo. 3, c. 35*; 42 *Geo. 3, c. 116*; 51 *Geo. 3, c. 99*.

(b) The practice of conveyancing, with respect to evidence of seisin, is understood to be this. The vendor's attorney tenders to the purchaser's attorney affidavits stating the fact of possession or of perception of rents and profits. Although these are merely voluntary affidavits, yet if they are objected to on that ground only, and the title is otherwise made out,

the course in the master's office, is to fix the purchaser with the costs occasioned by such rejection.

On the trial of an ejectment, or of any other issue at law involving the question of seisin, the parties who would be the deponents in such affidavits, would be examined *viva voce*, or upon interrogatories, according to the practice of the court.

Conveyancers receive leases, rent-rolls, and land-tax and poor-rate assessments, as confirmatory evidence, not as evidence *per se*.

Practice of conveyancers as to requiring evidence of seisin.



1833.  
 DOE  
 v.  
 ARKWRIGHT.

act of parliament. In *Lord Churchill v. Grace*, which came before the Court of C. P. three times, upon motions for new trials on the ground that the verdicts were against the evidence(a), the land-tax assessments were constantly received, and much stress was laid upon them. For all purposes of elections, land-tax assessments are received in evidence. [*Denman, C.J.* There is a direct reason for that(b)].

*Cur. adv. vult.*

DENMAN, C. J., in the course of the same term (c), delivered the judgment of the Court.—In this case land-tax assessments were given in evidence in order to prove the seisin of the ancestor of the lessor of the plaintiff. The question is, whether such evidence is admissible at all; and if it be, whether it amounts to proof of seisin. It appeared that the land-tax assessments, when the estate remained in the possession of the same family, were usually continued in the name of the ancestor, and that the name was not changed until the estate was sold or passed into the hands of another family. Under these circumstances, we are of opinion that the assessments would not have gone to prove seisin.

Rule refused.

(a) Therefore not reported.

(c) Easter term, 1833.

(b) *Vide ante*, 733, (a).

#### ROWE v. SHILSON.

Where a company is authorized by statute to embank waste land and to construct a

**INDEBITATUS** assumpsit for tolls. At the trial before *Park, J.*, at the Devonshire spring assizes, 1832, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case:

road upon the embankment, and to take tolls upon the road and all ways leading out of the same, such tolls are payable by persons using a railway which crosses the road, although the payments to be made by persons using the railway are fixed by the statute by which the railway is authorized to be made.

By an act of 42 *Geo. 3*, c. 32, a tract of marsh lands was vested in certain persons, who were united into a company for the purpose of embanking and preserving the said lands from the sea, under the name of "The Company of Proprietors for embanking part of the Lairy, near Plymouth." The embankment was accordingly made. By an act of 43 *Geo. 3*, cap. xv. the Company were empowered to make a turnpike road (of which they were to be deemed the trustees) from a place called Elford Quay, over the marsh lands lately embanked, to the borough of Plymouth, and from time to time to repair the same. They were authorized to erect such and so many turnpikes to receive the tolls thereby granted, upon or across the said road, and on or near the sides thereof, or in or near, upon or across any lanes or ways, leading or that might thereafter lead out of the same, as they should think proper; and in consideration of the great expense of making and maintaining the road, the Company was authorized to demand and take at the said turnpikes certain tolls. The road was accordingly soon after made.

By 59 *Geo. 3*, cap. cxv. "The Plymouth and Dartmoor Railway Company" was incorporated, and empowered to make a railway or tram road, (which it was recited would be of material convenience and benefit to the public,) from Prince Town, in Dartmoor, to Crabtree. In consideration of the great expense of making and maintaining the said railway, the Company was authorized to take, for the tonnage of all goods carried or conveyed upon the said railway, certain rates and duties; and it was enacted, that all persons should have free liberty to pass upon and use the said railway, with carts, waggons, or other carriages, properly constructed, and to employ the Company's wharfs and quays for loading and unloading such goods and other things, upon payment only of such rates and tolls as should be demanded by the Company, not exceeding certain rates therein mentioned, subject to the rules and regulations to be from time to time made by the said Company, by virtue

1833:

Rowe  
v.  
Shilson.

1833.  
  
 ROWE  
 v.  
 SHILSON.

of the powers thereby granted. This railway has been made and completed at a great expense.

By 1 *Geo.* 4, cap. liv. the Railway Company was authorized to make a branch railway, (which it was recited would be of public utility,) to communicate with the Plymouth and Dartmoor railway at Crabtree. By this act it was enacted, that the statute of 59 *Geo.* 3, and the several powers, provisions, rates, and other matters therein contained, should be by the said Railway Company used, applied and put in execution for making and maintaining the said branch railway, and also for making and doing all such other works, matters and things as they should think necessary or expedient for the benefit of such railway, and for defraying the expenses thereof; and should and might be used and exercised by the proprietors of lands lying near or adjoining to the said branch railway, in like manner, and as fully and effectually, as if the several powers and provisions, &c. had been repealed and re-enacted, and as if the branch railway and other works, by the same act authorized to be made and maintained, had been described in the act of 59 *Geo.* 3, as part of the works to be made and done by virtue of that act. The branch railway was accordingly made, and in its course crossed the road of the Embankment Company in two places. The plaintiff was the lessee of the tolls of the Embankment Company. The defendant's servant, on four several occasions, passed with a horse and waggon upon the branch railway across the Embankment Company's road, through a toll-bar, which that Company had placed across the railway and at the side of their road, and on each of these occasions he refused to pay the sum of 4*d.*, which was demanded of him at the toll-bar. The toll of 4*d.* was the sum which the Embankment Company was by 43 *Geo.* 3 authorized to take for a waggon drawn by one horse. The defendant's servant had paid the regular toll demanded by the Railway Company for passing along the railway.

If it shall seem to the Court that the plaintiff was entitled to recover, a verdict is to be entered for such sum as

the Court think proper, otherwise a nonsuit to be entered (a).

1833.  
  
 ROWE  
 v.  
 SHILSON.

*Bayly*, for the plaintiff. The Embankment Company was authorized by 43 *Geo. 3*, cap. xv. to erect as many turnpikes to receive the tolls granted by the act, upon or across the road, or in, near, upon, or across any lanes or ways leading or that might thereafter lead out of the same, as they should think proper, and to demand tolls at the said turnpikes. This railway is a way leading out of the said road and across which the Company was authorized to erect a turnpike and there to demand tolls. The subsequent act of 59 *Geo. 3*, cap. cxv. for making a railway from Crabtree to Prince Town, contains a clause (upon which it is understood the defendant mainly relies) that all persons shall have free liberty to pass upon and use the railway, upon payment *only* of such tolls as shall be demanded by the Railway Company, not exceeding the sums therein mentioned. There is nothing however in this clause derogatory to the private rights of the Embankment Company; for the railway to be made under this act could not interfere with the Embankment Company's road. But then reliance will be placed upon the clause of 1 *Geo. 4*, cap. liv. for making of the branch railway, which enacts, that the statute 59 *Geo. 3*, and its several powers &c., shall be used by the Railway Company, and be applied for making and maintaining the branch railway, and may be used as fully and effectually as if the powers, provisions, &c. contained in the same act had been re-enacted, and as if the branch railway had been described in the act of 59 *Geo. 3*. This, however, is a general clause, made *diverso intuitu*, and not intended to take away the Embankment Company's right to tolls. General words in an act of parliament, whether affirmative or negative, do not take away particular privileges or benefits, or interfere with private rights, which

(a) This case was argued and determined in Easter term, 1833.

1833.  
 ROWE  
 v.  
 SUTLSON.

are not absolutely inconsistent with the act. Nor does a subsequent act of parliament repeal a former one, even though the words taken strictly and grammatically would have that effect, when it appeared to be the intention of the legislature that such should not be the case. In all acts of parliament, powers derogatory to private rights must be construed strictly, and in the case of private acts, such powers must be construed with the strictness of a deed, against the parties obtaining the act; *Scales v. Pickering* (a), *Dr. Foster's case* (b); *Blackfriars' Bridge case* (c); *Goldson v. Buck* (d); *Bro. Abr. Parlement*, 52 (e); *Williams v. Pritchard*, per Lord Kenyon, C. J. (f); *Gregory's case* (g); *Chester Mill case* (h), *Rex v. Croke* (i).

*Butt*, contra. It is not intended to dispute the positions for which the cases were cited. By the 43 Geo. 3, it was never intended to authorize the Embankment Company to demand tolls in respect of any other way crossing their road and going in a different direction. This would be a great hardship upon the parties using the railway. No distinction can be taken between the two railway acts. The first act of parliament applies to the branch railway as effectually as if it had been a part of the original line. This railway is a common public highway, *Rex v. Severn and Wye Railway Company* (k), made by authority of parliament; and cannot be considered as coming within the clause that entitles the Road Company to erect turnpikes across lanes or ways leading out of their road. The case of *The Hull Dock Company v. Priestly* (l) is an authority to shew that the Court will not hold that a burthen is.

(a) 4 Bing. 448; 1 M. & P. 195.  
 (b) 11 Co. Rep. 63; Com. Dig.  
*Parliament* (R. 23.)  
 (c) Loft, 438, 442.  
 (d) 15 East, 376.  
 (e) Citing 4 E. 4, 12, (P. 4, E. 4,  
 fo. 12, pl. 19.)  
 (f) 4 T. R. 2.

(g) 6 Co. Rep. 19 b.  
 (h) 10 Co. Rep. 138.  
 (i) 1 Cowper, 26.  
 (k) 2 Barn. & Alders., 646.  
 (l) *Ante*, 85; 4 Barn. & Adol.  
 178. And see *Bussey v. Storey*,  
*ante*, 639, 4 B. & Ad. 98; *Pope v.*  
*Langworthy*, *ante*, 647.


imposed upon the public unless the words imposing it are clear and distinct.

1833.  
  
 ROWE  
 v.  
 SHILSON.

*Bayly*, in reply. It is said that it would be a hardship upon the parties using the railway to make them pay toll for *crossing* the road; but indeed it would be a great hardship upon the Embankment Company, whose tolls were given them in consideration of great expense, and are now taken from them by the Railway Company, if they should not be paid by the Railway Company for crossing their road. It was thought at one time by the legislature that a party ought not to be authorized to take tolls in respect of carriages, &c. which should only *cross* a road; and a provision to that effect was accordingly introduced into 3 Geo. 4, c. 126, s. 32; but the injustice of this regulation being soon seen, it was, by 4 Geo. 4, c. 95, s. 90, enacted, that the provisions of the former act should not extend to roads not under the care and management of trustees or commissioners, or roads which should be made or maintained under the provisions of any acts of parliament passed for an unlimited period, or interfere with any tolls taken thereon. This clause, amongst others, has been lately continued by 7 & 8 Geo. 4, c. 24, s. 20 (a).

**DENMAN, C. J.**—The question is, whether the plaintiff, who represents the Embankment Company, can recover tolls against the defendant, who represents the Railway Company. The Embankment Company rest their title upon the 32d clause of their act, which is 43 Geo. 3, c. xv. They must clearly make out their title; and upon reading this clause, it appears to me that it clearly entitles them to take toll in respect of a way leading out of their road, if nothing has been done since to deprive them of the right so given. This, it is contended by the defendant, *has* been done as regards the railway; for it is said, the railway is

(a) See 13 Geo. 3, c. 84, s. 34; *Phillips v. Harper*, 2 Chitt. R. 412.

1833.  
  
 ROWE  
 v.  
 SHILSON.

made by public authority, and therefore does not come within the clause. But no such distinction is made by the clause. It authorizes the Embankment Company to erect turnpikes across any lanes or ways leading, or that might thereafter lead, out of the road, but does not distinguish ways made by public authority from others. Then, there is a particular clause in the 59th *Geo. 3*, which, it is supposed, takes away the right of the Embankment Company; but upon reading that clause, it seems to me that its language is not precise enough to take away the rights of any former Company, but that it only regulates the amount of tolls which the Railway Company are to take. It would have been a very violent act to take from a former Company its clear right; and this certainly could not have been done except by language the most explicit.

LITLEDALE, J.—It appears to me also that the plaintiff is entitled to recover under the 32d section of 43 *Geo. 3*, c. xv. which I think applies not only to private roads, but to all roads, by whatever authority made. This right could not be taken from the Embankment Company without an explicit exemption of the public in the second act. The first Railway Act appears to me not to take away the tolls of the Embankment Company, but only to regulate the tolls to be paid to the Railway Company by those who use the railway.

PARKE, J.—I am also of opinion that the plaintiff is entitled to recover, though I had some doubt in the course of the argument. I agree that the Embankment Company (whose rights the plaintiff has as their lessee), being a private company, established for their own private benefit, cannot take more from the public than is expressly given them. So far it is clear. The question is, as to the effect of the provisions of the Embankment Company's act upon roads subsequently made. Now, if the railroad had been erected as a *private* road, it would have been clearly "a way

leading from and out of the Embankment Company's road." But then, in the act for making the railway, certain rights are given to the public. Let us see then what is the effect of the 43 Geo. 3, cap. xv. as to the rights of the public to pass along the new road. I had some doubt as to how this statute was affected by the subsequent act; but I am now disposed to think a public turnpike road would be charged, unless there were some particular provision by which a right is given to the public to go over and across the old road without payment of these tolls. It was contended that there was a particular provision exempting the public; that the railroad in question is made under the statute of 1 Geo. 4; and that the provisions of the old act of 59 Geo. 3 are to be brought into the new act. There is not, however, in the old act any particular proviso, nor does it contain any express words, giving the public such a right as is claimed. The provision in 59 Geo. 3 is merely a bargain between the public and the Railway Company, that the latter shall not take further tolls from the public than are mentioned in that act; and that upon payment of these tolls, the public shall pass along the railway without hindrance from the Railway Company. The 1 Geo. 4 authorizes the Railway Company to take the same rate of tolls in respect of the additional road. This, I think, is the meaning of the latter act; and therefore I do not think that this takes from the Embankment Company their right to charge for crossing the road. Upon the whole, therefore, I think the plaintiff is entitled to recover.

1833.  
  
 ROWE  
 v.  
 SHILSON.

Postea to the plaintiff (a).

*Butt* applied for and obtained leave to turn the special case into a special verdict (b).

(a) And see *Rex v. Pease*, ante, 690; S. C. 4 Barn. & Adol. 30; *Rex v. Hungerford Market Company*, in the matter of *Mary Yeates*, post, vol. ii. 340; *Rex v. London Gas Company*, 4 Munn. & Ryl. 10; 8 Barn. & Cressw. 54; *Rex v. Company of Proprietors of the Navigation of the River Avon*, 4 Maan. & Ryl. 23.

(b) Vide ante, 181, n. (93), in *Doc dem. Cooper v. Finch*.



1833.



BENJAMIN WILSON, THOMAS WILSON and JOHN WILSON,  
v. WILLIAM HIRST and WILLIAM HIRST, JUN.

In an action by A. a banker, against B. a customer, for the balance of an account, part of which arose whilst C. was a partner with B. Held, that C., after whose secession from the partnership B. and C. executed mutual releases of all demands, is a competent witness to disprove an item charged by A. in the account, although debts due to and by the firm of B. and C. are still unsettled, and although since the dissolution of partnership, B. as continuing partner, has asked his creditors for time.

**ASSUMPSIT** for the balance of a banking account. Plea: general issue, with notice of set-off. At the trial of the cause before *Alderson, J.*, at the Yorkshire spring assizes, 1832, the following facts appeared in evidence:

In 1824, an account was opened by the defendants and *Joseph Hirst*, manufacturers, at Leeds, with the firm of the plaintiffs, who were bankers, at Merfield. That account was continued up to June, 1831, when *Joseph Hirst* retired from the defendants' firm. From the particulars of the plaintiffs' demand, it appeared that the whole of the claims arose upon an account commencing in February and ending in December, 1831. The first item in the particulars consisted of the balance of the preceding banking account. The defendants had, since the secession of *Joseph Hirst* from the partnership, had considerable dealings with the plaintiffs, upon which no balance remained; but it appeared that they had lately asked their creditors for time to pay off their debts. The defence set up was, that the plaintiffs had been overpaid, that the agreement by the parties having been that four per cent. interest should be paid, and not five per cent. as charged by the plaintiffs. In order to prove the agreement respecting the rate of interest, the defendants called *J. Hirst*, and produced a release from the defendants to *J. Hirst*, and from him to the defendants, of all actions &c. and demands whatsoever, which he ever had or might thereafter have against them. It being objected that this witness was incompetent, on the score of interest, the learned judge refused to admit him. The verdict was found for the plaintiffs, but leave was given to the defendants to move for a new trial. In Easter term following, *F. Pollock* obtained a rule nisi; against which

*Coltman* and *Cresswell* now shewed cause. The witness was incompetent, and the releases executed could not

have the effect of restoring his competency. Notwithstanding the release, *J. Hirst* had an interest in the surplus of the partnership funds, similar to that which a bankrupt has in the surplus of his effects after the payment of his debts, and in the prospect of an allowance. The general release executed by the witness did not affect his right to a share of the surplus, since it was a future contingent right. There are many cases which shew that a right of this description cannot be released; *Hoe's case* (a), *Briscoe v. Ayer* (b), *Neale v. Sheffield* (c). In *Lampet's case* (d), it is laid down that the releasor must have a foundation or original inception of a right. Here, until the affairs were wound up, neither party could know on which side the balance would be or the claim exist, and therefore neither the one release nor the other could have any operation or effect. In addition to the release there should have been an assignment (e) by *J. Hirst* of all his interest in the partnership effects, and a covenant by the continuing partners to pay the partnership debts. There is another reason why the witness was incompetent. If the defendants obtained a verdict, and the plaintiffs were to bring an action against the witness for the same demand, the judgment in the former action might be pleaded in bar of the latter. If there be three partners, and an action is brought against two, and there is no plea in abatement, and judgment is recovered against the two, and a second action is brought against the third partner, he may plead in bar the judgment recovered against the two. A plea of this description was successfully pleaded in an action tried at Durham. In this case, although the third partner has not been joined, the partnership liability has been tried; and if this action fails, and a second action is brought against the witness, and succeeds, he will be entitled to call upon the defendants for contribution, and

1833.  
WILSON  
v.  
HIRST.

(a) 5 Co. Rep. 70 b.

(b) 2 Rolle's Abridg. 407, title Release, (U.) pl. 23, translated in 18 Vin. Abr. 327.

(c) Yelv. 193.

(d) 10 Co. Rep. 51 a.

(e) The release *pur mitter l'estate*, the proper conveyance between those who have joint possession, appears to be here called *assignment* to distinguish it from the release of actions and demands.

1833.

WILSON  
v.  
HIRST.

thus the defendants would circuitously be made to pay a demand which they had successfully resisted when the action was brought directly against themselves. The witness therefore had an interest in the verdict, as he would thereby be furnished with a defence to an action for the same demand brought against himself. It is no answer to say that the witness had another defence to any action brought against him, viz. that the balance due when the witness ceased to be a partner, was discharged by the subsequent payments, made by the defendants to the plaintiff. The rule as to the appropriation of payments is only a rule of evidence, and may be varied by slight circumstances.

*F. Pollock and Starkie*, contra. The witness was competent, although no release had ever been executed by him or given to him, since by the payment made subsequently to the period when the witness retired from the firm, the debt due from him was discharged, according to the rule laid down in *Clayton's case* (a). The only way in which *Hirst* could be charged was by his partners, and then the question as to the effect of the release arises. The release from the defendants to the witness operated to relieve him from all contribution for debt and costs, in case the plaintiff obtained a verdict; and the operation of the release from the witness to the defendants, was to prevent the witness participating in the partnership funds, in case the defendants got a verdict. It is however said that an unascertained balance cannot be released. It is apprehended there is no foundation for that position; and the cases cited do not go that length. It did not appear that there was any person who had a right to implead the witness and the defendants jointly. The testimony of a witness whose evidence tends to relieve from a debt a party with whom he is jointly liable to pay another debt, is no more inadmissible than that of a son to increase the estate of his father, or a creditor to increase the funds of his debtor, or of an attorney for his client, and who can only be paid by a verdict in his client's favour. [*Parke, J. In Carter v. Pearce* (b), a creditor of the

(a) 1 Mer. 585.

(b) 1 T. R. 163.

intestate was held to be admissible as a witness, for the administration. In a subsequent case, *Craig v. Cundell* (a), Lord Ellenborough held that such creditor was not an admissible witness where the estate was insolvent.] The distinction, it is apprehended, is this; where the demand of the creditor is entirely *personal*, there his testimony is receivable; but where the creditor has a claim upon the *fund* to be recovered, there he is inadmissible. The interest of the witness in this case was only personal. If the witness be interested at all, it must be for one of these four reasons,—that if the plaintiffs recover a verdict, he will be liable to an action by his partners for contribution,—or that he has an interest in the partnership funds, and that the judgment and execution will diminish those funds,—or that he will be still liable in equity,—or that the verdict for the defendant will be a bar to an action brought against the witness for the same demand. As to the first objection, the release given by the defendants would be an answer to an action for contribution. Then as to the second objection, if the judgment and execution exhaust the partnership funds, and the other creditors of the firm resort to the witness for payment, he will become a creditor of the defendants; but this would not render him incompetent; *Carter v. Pearce* (b), *Paull v. Brown* (c). [Parke, J. There is a difference where, if the party obtains a verdict, a fund is created, out of which the claim of the witness may be satisfied; *Craig v. Cundell*.] If the partnership funds are sufficient to pay the debts of the firm, the witness was clearly competent. Then as to the objection that the witness, notwithstanding the release, would be liable in equity. [Parke, J. There is a case (d) in which Lord Alvanley expressed an opinion to that effect.] The liability in equity is a mere contingency, and it is not to be presumed that the firm was insolvent. This Court cannot take notice of a liability in equity, arising from the want of funds on the part of the defendants. Then as to the last

1833.  
WILSON  
v.  
HIRST.

(a) 1 Campb. 381.

(d) *Cheyne v. Koops*, 4 Esp. N.

(b) 1 T. R. 168.

P. C. 112.

(c) 6 Esp. N. P. C. 34.

1833.

WILSON  
v.  
HIRST.

objection, in *Young v. Bairner* (a) it was held, that where an action is brought against one of several partners, another partner, after a release by the defendant, is admissible to prove that he is liable, and thereby to defeat the action. The testimony of a witness is not to be excluded, unless the objection be plain.

*Cur. adv. vult.*

DENMAN, C.J. delivered (b) the judgment of the Court (c). After stating the facts, his lordship proceeded thus :

On the part of the defendant it was contended, that from the course of dealing between the plaintiffs and the partnership, and the receipts and payments that had taken place, the debt due to the plaintiffs whilst the witness was a partner had been discharged, according to the rule in *Clayton's case* (d), and that as the witness was no longer liable to the plaintiffs' demand, there could be no objection to his testimony. But though the payment of money on account generally, without a specific appropriation, would in many cases go to discharge the first part of an account, such payment is not conclusive; it is evidence of an appropriation only; and other evidence may be adduced which may vary the application of the rule; and therefore we cannot say to a certainty that the debt owing by the witness to the plaintiffs has been discharged: and indeed the defence proceeds upon the ground that the moneys paid in are not to be appropriated to the payment of this debt, but only to part of it, viz. that part in which there is no overcharge of interest. But we are of opinion that the mutual releases which have been executed by the defendants to the witness, and by him to the defendants have made him a competent witness. It was contended on the part of the plaintiffs, that the witness came to increase the surplus of the partnership effects, and that he

Though payment of money on account generally, without a specific appropriation, would in many cases go to discharge the first part of an account, such payment is not conclusive; it is evidence of an appropriation only; and other evidence may be adduced to vary the application of the rule.

(a) 1 Esp. N. P. C. 103.

*Parke, Taunton, and Patteson, JJ.*

(b) In Easter Term, 1833.

(d) 1 Merivale, 585.

(c) *Denman, C. J., Littledale,*

1853.  
  
 WILSON  
 &  
 HIRST.

was interested in that, and that his release did not release his right to that surplus, as it is something which is to arise in future; and cases were cited to shew that things which rest in contingency and possibility are not released by this general form, which only applies to what exists at the time when the release is given. There will be found in *Lampet's* case (a) some instances where a release does not extend to things in future; and in *Co. Litt.* 290 and 291 (b), and in 2 *Rolle's Abr.* 401, and several of the following pages; and in the additional cases to *Rolle*, given in 18 *Viner's Abr.*, beginning at p. 299, will be found other instances to the same point. Many of these, however, are upon the construction of single particular words, as duties, or debts, or actions. But in *Littleton*, s. 508, and *Coke's* commentary upon it, 291 b, the release of *all demands* is treated as having a most extensive operation; and the releases in the present case contain not only the word "demands," but also all the other words, which in the various cases are of themselves only taken as having a limited operation. But, in fact, the claim of any surplus that might arise had an existence at the time of the release. At that time the partnership had money due to them, and they owed money; and amongst the debts claimed from them was this to the plaintiffs; the amount of which depended upon the question of the rate of interest. The facts which raised that question were capable of being ascertained; and there was an ultimate, if not an immediate, certainty how the law would attach on such a state of facts. The amount of the balance, though uncertain as far as it depended on the funds to be realised, did not depend upon any new state of things to arise thereafter, but merely whether the funds would be available: and it falls within the rule laid down in *Lampet's* case (c), that a future right or possibility which may be released, ought to have a foundation and an original inception, and ought to be a

(a) 10 Co. Rep. 50 b.

(c) 10 Co. Rep. 50 b.

(b) 3 Tho. Co. Litt. 423, 424.

1693.

ARDEN

v.

TUCKER.

First point.

As to the first objection, when it is recollected that the retainer filed in the Court is an authority quoad the proceedings in that Court only, and is analogous to the warrant of attorney filed of record in this Court, and that the undertaking which is to be enforced in the Palace Court must necessarily be to the attorney in that Court, the evidence of a joint contract with both plaintiffs is very little affected by this species of proof. And on the whole, the weight of evidence is clearly in favour of the joint employment of both plaintiffs.

Second point. - The second objection is, that such a joint contract is void in law, on the ground that the attorney in the Palace Court could alone sue for business done in that Court.

There is no act of parliament which regulates the proceedings in this Court, and therefore the case must be considered as one at common law. No authorities were cited in support of the second position, except the case of *Brandon v. Hubbard* (a), and that of *Hemming v. Wilton* (b) in the Exchequer. The former case (in which there was no joint employment of the plaintiffs) has no bearing upon the present. The latter is, as far as we can learn, not reported. It is not in any of the published reports of the Court of Exchequer; and the decision that the clerk in court in the Exchequer might sue alone for business done in that Court, though he and his partner had delivered a bill as for business done by both, may have proceeded on the ground that the joint contract with both partners was not clearly made out.

In the absence of any enactment or decision to the contrary, (which we must take to be the case,) the question is, whether upon any principle of law there is an objection to this action at the suit of both where the contract is with both. And we think there is no objection.

Suppose neither of the plaintiffs had been attorneys of that Court, but that the defendant had employed them, and

(a) 2 Brod. &amp; Bingham, 11.

(b) *Ante*, 760.

the early part of that case, it appears that mutual releases were proposed to be given, but that Lord *Alvanley*, C. J. thought that was not sufficient to make the partner competent. In the latter part of the case, however, he said that if the defendant gave a release to the witness, he would allow him to be examined, and a verdict to be taken, subject to the opinion of the Court. But the defendant not being in Court, the witness was not examined. We think, however, that the reasoning of Lord *Alvanley* would not make the witness incompetent; and we are therefore of opinion that *Joseph Hirst* was a competent witness, and that consequently the rule for a new trial must be made absolute.

1832  
WILSON  
v.  
HIRST.

Rule absolute.

WILMOTT, Gent. one &c. v. ELKINGTON.

**ASSUMPSIT** upon articles of agreement made between the plaintiff and the defendant, in 1832, whereby after reciting that deeds belonging to the defendant had been deposited with the plaintiff and were lost, the plaintiff agreed to pay 100*l.* in consequence of the deeds having been mislaid; and the defendant agreed to return the 100*l.* and interest, if it should afterwards be proved that the deeds had not been mislaid by the plaintiff, or by any person employed by him. Breach; that the defendant had not returned the 100*l.* and interest upon proof that the deeds had not been mislaid by the plaintiff or any one employed by him. *Plen; non assumpsit.* At the trial before *Denman*, C. J. at the Warwickshire spring assizes, 1833, it appeared that in 1807, the plaintiff, as attorney for the defendant, purchased property for him, and the deeds remained with the plaintiff. In the same year the defendant wishing to raise

An attorney with whom deeds are deposited in order to enable him to obtain money for the party depositing, is bound upon inquiry by his client to inform him where such deeds are.

An attorney with whom deeds are deposited, places them without his client's knowledge in the hands of a party from whom he has borrowed

money for his client. The attorney is afterwards unable to inform his client where the deeds are. He is chargeable with having *mislaid* such deeds.



1833.

WILMOTT

v.

ELKINGTON.

money, the sum of 200*l.* was advanced by a party to the defendant, upon receiving from the plaintiff the defendant's bond and the deeds, which were deposited with him as an additional security. In 1822, when the deeds were inquired for, the plaintiff had forgotten that they had been deposited as a security for the money borrowed when the above agreement was entered into. The learned Chief Justice left it to the jury to say whether the deeds were so deposited with the knowledge of the defendant, and directed them, that if they thought that the defendant was informed that the deeds were to be handed over, they should find for the plaintiff, otherwise for the defendant; for that the plaintiff, an attorney, ought to have been able to inform the defendant where the deeds were deposited. The jury found for the defendant.

*Adams*, Serjt. now moved for a new trial. The deeds cannot be said to have been *mislaid* by the plaintiff in this case; for it may be that circumstances required that in order to raise the money for the defendant, as the plaintiff had been directed, he should deposit the deeds with the lender as an additional security; and if such was the case, the plaintiff did no more than his duty, whereas *mislaying* implies negligence.

*Cur. adv. vult.*

DENMAN, C. J. on a subsequent day in the same term<sup>(a)</sup>, said that the Court was of opinion that the deeds must, under the circumstances, be considered as having been *mislaid* by the plaintiff; that it appearing that his client was not aware of the deeds having been deposited with the party who had advanced the 200*l.*, the plaintiff ought to have been able to inform him where he might find his deeds when he required them.

Rule refused.

(a) Easter term, 1833.

1833.

SHAW and others, Assignees of RICHARD BATLEY,  
v. THOMAS BATLEY.

**THIS** cause, and all matters and all other claims which the assignees might have against the defendant, were referred to the arbitration of a barrister. The arbitrator awarded 1950*l.* as damages in the action; and touching and concerning a certain other claim of the assignees upon the defendant (not included in the action), relating to the sum of 400*l.* and two bills of exchange for 500*l.* each, the arbitrator found the following facts:

26th March, 1828. Earl *Stradbroke* agreed, in writing, with *Richard Batley* to sell him certain marked oak trees, on credit expiring 1st February, 1829; but *R. B.* was to give security, if required.

29th March, 1828. *R. B.* committed an act of bankruptcy.

25th April, 1828. Earl *Stradbroke* agreed in writing to sell to *R. B.* other marked trees, on credit: no part of the same (except the bark and topwood) to be removed until actually paid for, or secured to the satisfaction of the vendor.

*R. B.* took possession, and sold the bark and topwood, of the value of 2000*l.*, and paid 600*l.* on account to the vendor, Earl *Stradbroke*, who thereupon required security for the residue of the purchase money, and refused permission to remove until security given.

5th June, 1828. The defendant having consented to become security for *R. B.*, his son, an agreement in writing was made betwixt *R. B.* and the defendant, which, after reciting the two contracts, and that 600*l.* had been paid by *R. B.* in part, and that all the timber had been felled and remained there (except the bark and topwood), and that the vendor had required security, and that *R. B.* had applied to the defendant to become surety or guarantee for him, and in order to indemnify him he agreed to assign and

*A.*, after a secret act of bankruptcy, buys goods of *B.*, to be paid for at a future day. On that day *A.* delivers to *C.* undue bills for the amount, requesting *C.* to pay *B.* for the goods. *C.* discounts the bills, and pays *B.* by a cheque on his bankers. This payment is protected, by 6 *Geo. 4*, c. 16, s. 82, against the assignees under a commission issued subsequently to such payment, on the antecedent act of bankruptcy.

1893.

SHAW

v.

BATLEY.

make over to him all the timber trees, and the said contracts and agreements for the purchase thereof, and that the defendant had accordingly consented and agreed to become surety and guarantee to the Earl for the due payment of the balance of the said purchase money upon the terms and conditions thereafter mentioned,—proceeded as follows: Therefore, in pursuance of the said recited agreement, *R. B.* agreed to sell the said timber to the defendant and the said contracts and agreements, and the defendant agreed to buy the same at 7*l.* per load, (being the same price to be paid to the Earl after deducting the value of the bark and topwood, which *R. B.* had already taken to his own use,) to be paid or allowed by the defendant to *R. B.*, and then the defendant agreed to accept bills, to be drawn upon him by *R. B.*, for the amount of the sum which should remain due to the Earl after payment of the sum of 650*l.*, 750*l.* and 100*l.*, payable to the Earl or his order, and would give such other guarantee as the Earl should require.

On the same 5th June, the Earl required a guarantee. Such guarantee was signed and delivered by the defendant, who thereby guaranteed the payment of all sums of money then due to the Earl from *R. B.* on account of certain oak timber trees; the defendant “having purchased the said timber and all benefit of the contracts entered into by *R. B.* for the purchase thereof.”

16th June, 1828. *R. B.* and the defendant agreed that *R. B.* should be allowed to have the timber first purchased by *R. B.*, and afterwards by the defendant, of the Earl, at such prices and on such terms as the same had been purchased of the Earl by *R. B.* and the defendant, or one of them; that the defendant should retain in his hands the sum at which certain stock in trade, &c. of *R. B.* should be valued, as a security for any sum he might pay or lose in consequence of engagements he was under to the Earl for the purchase money of the timber; that the property in the timber should still remain in the defendant until the whole

purchase money were paid to the Earl, and that he should have the right of stopping its removal from the Earl's estate or other places, until payment of such purchase money, and should be at liberty to sell in order to raise money for payment of the same; that the money to be paid by the contractors or other persons, for timber to be sent from the Earl's estate to Lynn, for the completion of certain works there, should be paid to the defendant; whose receipt, it was agreed, should be a good discharge; which money should be paid or retained by him on account of the purchase money; that the sum of 1400*l.*, which the Earl had to receive on the 23d June instant, should be paid by *R. B.*, and that it had been agreed that *R. B.* should pay this sum of 1400*l.*, being the 750*l.* and 650*l.*, because he had already received and sold the bark and tops to the value of 2000*l.*, and had paid only 600*l.*

In consequence of the defendant's having guaranteed the payment to the Earl of the 750*l.* and 650*l.*, and of *R. B.*'s having so agreed to pay the 1400*l.*, *R. B.*, between the 16th and 21st of June, 1828, delivered to the defendant 400*l.* in cash, as being his own proper money, and two bills of exchange for 500*l.* each, as his property, drawn by *R. B.* on one *Smith*, and not then due, and for the purpose of the defendant's paying the said sum of 1400*l.* to the Earl. The defendant paid the 400*l.* into his bankers, and indorsed the bills to them as his own property. On 21st July, 1828, the defendant paid the 1400*l.* to the Earl by a draft on his bankers, which was duly paid.

29th July, 1828. A commission of bankrupt issued against *R. B.* upon the act of bankruptcy committed on the 29th March; and the plaintiffs were duly appointed assignees. The two 500*l.* bills not having been paid when due, the same have been and stand proved under the commission. The defendant, besides the 1400*l.*, has paid to the Earl on account of the timber 8986*l.* 3*s.* 3*d.*, which with the sum of 600*l.* paid by *R. B.*, and the 1400*l.*, amount to

1838.

SHAW  
v.  
BATLEY.

1893.

STRAW

vs.

BATLEY.

10,986*l.* 5*s.* 9*d.*, the full amount of the price of the timber, bark and tops.

The plaintiffs, as assignees, claimed the 400*l.* delivered by *R. B.* to the defendant, and required the arbitrator to award that the defendant should pay the same to them as such assignees, and also that he should award that the defendant should indemnify the bankrupt's estate against the proof of the bills and all dividends in respect thereof. The arbitrator, not thinking the claim of the plaintiffs well founded, awarded that the same was not sustainable, but that nevertheless, if the Court of K. B. should be of opinion and adjudge that the claim is well founded and sustainable, he awarded and directed that the defendant should pay the sum of 400*l.* to the plaintiffs as such assignees, and also should pay to them as such assignees the amount of any dividend that they, as assignees, had paid; or should or might be obliged to pay, in respect of the proof of the bills, or either of them, under the commission; and also should sufficiently indemnify the bankrupt's estate against all payments, claims and demands whatsoever, for or in respect of such proof; and also should in such case relinquish and assign to the plaintiffs, as such assignees, all benefit to be derived or acquired in respect of the said bills from the drawer thereof.

In Trinity term, 1892, a rule was obtained on behalf of the plaintiffs, calling on the defendant to shew cause why he should not make the payments, &c. (as above), according to the terms of the award, and why the plaintiffs should not be at liberty to enter up judgment for the sums payable.

The case was afterwards set down in the special paper.

*Sir James Scarlett*, for the plaintiffs. The assignees seek to recover from the defendant the sum of 400*l.*, and to be indemnified in respect of two bills for 500*l.* each. The 400*l.* in cash and the two bills having passed to the defendant from the bankrupt since the act of bankruptcy, and within two months before the commission issued, a prima

fact, case is established for the plaintiffs. What are the peculiar circumstances upon which the arbitrator relies for awarding in favour of the defendant? There is a class of cases which establish, that where a party receives money from a bankrupt as a mere agent, to pay over to a third person, he is not liable to the assignees in respect of the money so received, and it is probable that the arbitrator has formed his opinion upon those, considering that this case came within them; *Coles v. Wright* (a), *Tope v. Hockin* (b). The present case, however, is quite of a different description. There are here three parties. As between Lord *Stradbroke* and the defendant, the latter is a guarantee for his son. In the very instrument of guarantee the defendant declares *himself* the purchaser. But his son had already paid 600*l.* to Lord *Stradbroke*, and had received 1,400*l.* beyond the 600*l.* by the sale of toppings and bark. Now it is impossible that the father could have the full benefit of the contract, unless the 1,400*l.* were paid to him; and the son accordingly contracts to do so. He was bound to furnish his father with 1,400*l.* and accordingly he did so; but it is evident that the son did not treat the act as if he were dealing with a mere agent; neither did the father receive the money as in the character of an agent; he treats the bills and cash as his own, pays them into his bankers as his own, and pays Lord *Stradbroke*, a considerable time afterwards, by a cheque on his bankers. The duty of an agent would be at once to hand the money over. The father had a right to the money. Although it is true that the son would have been bound by his contract as between himself and Lord *Stradbroke*, yet the father might have sued the son for the 1,400*l.* The circumstance of the father's being in his turn bound to pay the money to Lord *Stradbroke*, does not constitute him an agent for the purpose.

*F. Pollock*, for the defendant. The assignees cannot recover unless they have both equity and law in their favour.

(a) 4 Taunt. 398.

(b) 7 Barn. & Cresw. 101.

1833.

SHAW  
v.  
BATLEY.

1833.

SHAW  
v.  
BATLEY.

The Court therefore will look at the substance of the transaction. The defendant interferes to protect the credit of his son, who had made purchases to a large amount; and for this purpose he enters into an agreement, by which in substance he says, "I will take this property and guarantee you. The property shall be considered as mine, but the whole is done for the purpose of relieving you from the embarrassments in which you have placed yourself. But as you have had goods to the value of 2000*l.*, and have only paid 600*l.*, you shall pay me the 1,400*l.* which you are bound to pay upon the contract on a particular day." It does not appear from the award that the money was not paid over on the same day; and it is expressly found that the cash and bills were delivered for the purpose of the defendant's paying the 1,400*l.* to the Earl. The Court will not say, that because the father did not say, "You must pay that yourself to the Earl, because I may run some risk, or you must get the bills discounted and pay the money by a cheque," the transaction is not protected. Such arrangements as these are rather symptoms of fraud than signs of honest dealing. In *Coles v. Wright (a)*, it was decided that where money was delivered to a defendant for the purpose of being handed over to another person, he could not be considered in any other light than as a mere channel of communication, and had no responsibility thrown upon him. This decision, it is true, was a departure from a strict and inconvenient rule, but it has ever since been considered as an enlightened decision. *Tope v. Hockin (b)* may be open to some observation; it may be said that there was no decision of the Court upon that point. But Lord Tenterden, who delivered the judgment of the Court, expressed an opinion upon the point, though it was not intended as a judicial decision. Here, money or money's worth is delivered to the defendant for the purpose of paying Lord Stradbroke; and he does pay him. It will probably be said, you did not pay over the identical 400*l.* in cash; but no agent ever thinks

(a) 4 Taunt, 198.

(b) 7 Barr. &amp; Cressw., 101.

of taking the identical money in his pocket to pay it over; usually the money is paid by the agent into his bankers, and a cheque upon the bank is given to the principal. Then with regard to the two bills of exchange; shall it be said, that when they are discounted the party is not to touch the money upon pain of being rendered liable to the assignees? If gold were delivered to a party to be paid over to a third person, and he instead paid over bank notes, this would not make him a creditor in respect of the notes, leaving him a debtor in respect of the gold.

1832.  
SHAW  
v.  
BATLEY.

Sir James Scarlett, in reply. In *Coles v. Wright* the defendant was clearly only an intermediate holder, who had paid over the money which he had been employed to carry. And there it was held also that the *auctioneer* who had sold the goods for, and had sent them by the defendant to a trader lying in prison, and who, by lying two months in prison, afterwards committed an act of bankruptcy having relation back to the imprisonment, was liable to the assignees. So, in *Toppe v. Hockin*, the arbitrator was the mere hand that paid. There, also, the assignees might have recovered from the party to whom the money was paid by the arbitrator. Here, even before the late bankrupt act, the assignee could not have recovered from Lord *Stradbroke*, because he would have had this complete answer, that the money had been paid to him by the father on his own account. Suppose the act of bankruptcy had not been committed in March, but that the bankrupt had paid the money to his father, knowing his circumstances, the relation between him and his father would be a strong circumstance to shew a fraudulent preference. In March the bankrupt knew that he was going to commit an act of bankruptcy, that he was insolvent, that he was in fact a bankrupt, and that therefore his property belonged to his assignees. This is a preference of a favoured creditor. This is not the money of the bankrupt, yet if the father had immediately paid over the same money, there might have been some colour for saying that



1833.

ARDEN.

TUCKER.

First point.

As to the first objection, when it is recollected that the retainer filed in the Court is an authority quoad the proceedings in that Court only, and is analogous to the warrant of attorney filed of record in this Court, and that the undertaking which is to be enforced in the Palace Court must necessarily be to the attorney in that Court, the evidence of a joint contract with both plaintiffs is very little affected by this species of proof. And on the whole, the weight of evidence is clearly in favour of the joint employment of both plaintiffs.

Second point. - The second objection is, that such a joint contract is void in law, on the ground that the attorney in the Palace Court could alone sue for business done in that Court.

There is no act of parliament which regulates the proceedings in this Court, and therefore the case must be considered as one at common law. No authorities were cited in support of the second position, except the case of *Brandon v. Hubbard* (a), and that of *Hemming v. Wilton* (b) in the Exchequer. The former case (in which there was no joint employment of the plaintiffs) has no bearing upon the present. The latter is, as far as we can learn, not reported. It is not in any of the published reports of the Court of Exchequer; and the decision that the clerk in court in the Exchequer might sue alone for business done in that Court, though he and his partner had delivered a bill as for business done by both, may have proceeded on the ground that the joint contract with both partners was not clearly made out.

In the absence of any enactment or decision to the contrary, (which we must take to be the case,) the question is, whether upon any principle of law there is an objection to this action at the suit of both where the contract is with both. And we think there is no objection.

Suppose neither of the plaintiffs had been attorneys of that Court, but that the defendant had employed them, and

(a) 2 Brod. &amp; Bingham, 11.

(b) *Ante*, 760.

*Stradbroke*. Upon that supposition, the payment is protected under the 82d section of the 6 Geo. 2, c. 16. But for the provisions of this statute (and the 19 Geo. 2, c. 32, s. 1.) the assignees could certainly have recovered back both sums from Lord *Stradbroke*, though the specific 400*l.* received from the bankrupt was not paid into his hands, (as to the last point, *Allanson v. Atkinson* (a) is an authority.) But the clause in the existing Bankrupt Act, if not that in 19 Geo. 2, clearly protects this payment, and prevents the assignees from recovering the amount. If the assignees cannot recover from Lord *Stradbroke*, and the payment to him is good, it cannot be permitted that they should recover from the agent, who merely acts as agent in making a valid disposition of the bankrupt's property.

For these reasons we are of opinion that the award is right, and that the plaintiff's rule must be discharged.

Rule discharged.

(a) 1 Maule & Selw. 583.

JOSEPH ARDEN and RICHARD EDWARD ARDEN, Gents.  
two &c. v. TUCKER, Gent. one &c.

**ASSUMPSIT** for work and labour, as the attorneys, solicitors and agents of the defendant, with the common money counts. At the trial before Lord *Tentenden*, C. J., at the sittings after Trinity term, 1882, his lordship nonsuited the plaintiffs, but gave them leave to move to enter a verdict for 18*l.* 16*s.* 2*d.*, the evidence given being as follows:

On the part of the plaintiffs, their bill, which was for business done in the Palace Court as attorneys, and amounting to 25*l.* 10*s.* 6*d.*, was produced; and it was proved that the business had been done for the defendant, who had subsequently called at the plaintiffs' office and agreed to pay them 20*l.* for their debt. The plaintiffs also tendered

1833.

SHAW  
v.

BATLEY.

*A.* employs *B.* and *C.*, who are attorneys and partners, to prosecute an action in the Palace Court, *B.* alone being an attorney of that Court. The amount of *B.* and *C.*'s bill of costs is recoverable from *A.* in a joint action by *B.* and *C.*

1833.

ARDEN  
v.

TUCKER.

in evidence, an undertaking given by the defendant to both the plaintiffs upon his application to have the bill taxed, but this was rejected by Lord Tenterden, upon an objection that it had not been declared upon, and was an agreement unstamped. A letter from the defendant to the plaintiffs was read, in which the defendant offered to give the plaintiffs a bill for 15*l.*, and to pay 5*l.* more in case the damages and costs were recovered from *Stevens*, whom the plaintiffs had been employed by the defendant to sue. For the defendant the roll of attorneys of the Palace Court was produced by the prothonotary of that Court, and it was proved that the plaintiff *Richard Edward Arden* was not one of the attorneys of that Court. The witness also produced the original warrant to prosecute, filed in the Palace Court, in the action *Tucker v. Stevens*, and the bill of costs taxed at 18*l.* 16*s.* 2*d.* by the deputy prothonotary, and also the order for taxation, all in the name of *Joseph Arden* alone. *Campbell*, for the defendant, contended that there ought to be a nonsuit for misjoinder of plaintiffs, and cited *Brandon v. Hubbard* (a), and contended also that the plaintiffs could not recover upon the subsequent promises, because there was no consideration moving from *R. E. Arden* to the defendant, and in support of that point cited *Collins v. Godefroy*. The learned Chief Justice said, I cannot distinguish this case from *Brandon v. Hubbard*; there is a misjoinder of plaintiffs, and they must be nonsuited. Upon the other point, I think the promises must be taken to refer to the original consideration. His lordship having given leave to move to enter a verdict for the plaintiff, a rule nisi to that effect was obtained in last Michaelmas term, against which, in Easter term,

*Campbell*, S. G. and *F. Kelly*, shewed cause. Unless the defendant was previously liable to the plaintiffs jointly, the offer of a cognovit to them jointly could not form such a promise as would sustain an action; *Collins v. Godefroy* (b). The only question is, whether there was in this

(a) 4 B. Moore, 367.

(b) 1 Barn. &amp; Adol. 950.

1893.  
  
 ARDEN  
 v.  
 TUCKER.

that a joint retainer, and a liability to the two plaintiffs jointly, for if a man were liable to A. only, and wrote a letter promising to pay A. and B., it would not be a binding promise. The warrant to prosecute or retainer was to Joseph Arden alone. He alone therefore could have been sued if he had misconducted the cause, and he alone can sue for the business done. The rule for the taxation of costs, and which of course is upon an undertaking on the part of Tucker to pay the costs taxed, was in the name of Joseph Arden alone, and the officer's allocatur must have followed the rule. [Parke, J. The bill was the bill of both.] It was *de facto*, but not *de jure*. [Parke, J. The case is the same as an action upon a bill of two attorneys in partnership in respect of business done by one of them in the Exchequer, before the late rules, the second partner not being an officer of that Court.] The question has been decided by the Court of Exchequer in the case of *Hemming v. Wilton*, no report of which has been found. That case was the converse of this, being an action for business done in the Exchequer in the name of one of two partners, he alone being an officer of the Court of Exchequer. *Hemming* and *Baxter* carried on business generally as attorneys, and had received instructions from *Wilton* to carry on divers suits in which he happened to be engaged, some in B. R. and some in the Exchequer. A bill was delivered in the name of *Hemming* and *Baxter*, and the evidence generally showed that the two were employed jointly to conduct the suits in the Exchequer, as well as the other business. At the trial the Lord Chief Baron refused to nonsuit, upon an objection that *Baxter* should have been joined in the action, and the Court of Exchequer being afterwards moved for a new trial on this ground, refused to grant a rule. Now if this had been an action brought by *Joseph Arden* alone, the case of *Hemming v. Wilton* would have been a clear authority to shew that the action was well brought; and if so, it is an authority also to shew that the two partners cannot sue jointly. [Parke, J. Suppose neither of them had

1833.

ARDEN

v.

TUCKER.

been an attorney of the Palace Court, and they had been employed to get the business conducted by other persons legally authorized, could they not recover? Yes; in the form of an action for money paid by them to the other persons for conducting the business; but even in that case they could not have recovered on a declaration in the form used in this action. This is an action for conducting and prosecuting business in the Palace Court, brought by two persons jointly, whereas one only of the two plaintiffs could lawfully do the business. In *Brandon and Brown v. Hubbard* (a) it was held, that a replevin clerk, who is partner in an attorney's firm, must sue alone for the expenses of preparing a replevin bond, though it is prepared at the office of the firm.

Sir J. Scarlett, contra. The objection is not tenable. The only case is that of *Brandon v. Hubbard*, and upon examination it will be found that there is no analogy between that case and the present. It would have been illegal there for the partner, who was the replevin clerk, to conduct business as such jointly with a partner (b). It has been decided that an attorney of the Court of Exchequer might carry on business in partnership with an attorney of the B. R., and it has never yet been doubted that they might sue jointly upon their bills. There was a case of *Elkins and another v. Harding* (c), decided in the Exchequer in 1831, in which such an objection, if tenable, would have been taken. In that case one of the plaintiffs was a side clerk of the Court of Exchequer, and the other an attorney of B. R., and the action was against an attorney practising in London, for business done in the Exchequer. The plaintiffs

(a) 2 Brod. & Bingh. 11; 4 B. Moore, 367.

(b) As to the character of a replevin clerk, see 1 & 2 Phil. & Mary, c. 13, s. 3, by which the sheriff is directed to appoint four deputies at the least, dwelling not

above twelve miles from one another, who shall have authority in the sheriff's name, to make replevin and deliverance of distresses.

(c) 1 Crompton & Jarvis, 345; S. C. 1 Tyrwhitt, 274.

relied on a passage in *Manning's Exchequer Practice*; which is recognized by the Court in giving judgment, where it is said, "The ground upon which Exchequer privilege stands is, that the king's business may not be impeded through the absence of his officers. This reason holds equally strong in cases where the officer is a sole plaintiff, as in those where he sues with others" (a). If the defendant's was a good absterger, it might also be said in every common action by two attorneys jointly, for business done in a suit, that only one of them was employed, of which the record is evidence. Unless the law prohibits partnerships of attorneys of particular Courts, with those of other Courts, they may sue jointly for business done in the Court of which one only is an attorney.

1839.  
ADDEN  
v.  
TUCKER.

DENMAN, C. J.—We wish to see what was done in the case of *Hemming and Baxter v. Wilton*; and therefore we will defer our judgment.

*Cur. adv. vult.*

DENMAN, C. J., in the same term, delivered the judgment of the Court (b).

The plaintiffs in this case were in partnership as attorneys. One of them only was an attorney in the Palace Court; and the action was brought by both, for business done in that Court. There was sufficient evidence of a contract by the defendant with both the plaintiffs that they should do the business for him. But it was contended, first, that this evidence was clearly rebutted by proof of a written retainer of one of the plaintiffs alone, who was the attorney in the Palace Court, and the order to tax and undertaking to pay his bill, which shewed a contract with that plaintiff alone; and, secondly, that if not, the contract with the plaintiffs was not binding in point of law.

(a) *Mann. Exch. Pract.* 1st edit. 251. This passage and the cases from *Burton* there cited in support

of it, appear in *Crompt. & Jervis* as part of the argument of counsel.

(b) *Denman, C. J., Littledale and Parke, JJ.*

1833.

ARDEN

TUCKER.

First point.

As to the first objection, when it is recollected that the retainer filed in the Court is an authority quoad the proceedings in that Court only, and is analogous to the warrant of attorney filed of record in this Court, and that the undertaking which is to be enforced in the Palace Court must necessarily be to the attorney in that Court, the evidence of a joint contract with both plaintiffs is very little affected by this species of proof. And on the whole, the weight of evidence is clearly in favour of the joint employment of both plaintiffs.

Second point.

The second objection is, that such a joint contract is void in law, on the ground that the attorney in the Palace Court could alone sue for business done in that Court.

There is no act of parliament which regulates the proceedings in this Court, and therefore the case must be considered as one at common law. No authorities were cited in support of the second position, except the case of *Brandon v. Hubbard* (a), and that of *Hemming v. Wilton* (b) in the Exchequer. The former case (in which there was no joint employment of the plaintiffs) has no bearing upon the present. The latter is, as far as we can learn, not reported. It is not in any of the published reports of the Court of Exchequer; and the decision that the clerk in court in the Exchequer might sue alone for business done in that Court, though he and his partner had delivered a bill as for business done by both, may have proceeded on the ground that the joint contract with both partners was not clearly made out.

In the absence of any enactment or decision to the contrary, (which we must take to be the case,) the question is, whether upon any principle of law there is an objection to this action at the suit of both where the contract is with both. And we think there is no objection.

Suppose neither of the plaintiffs had been attorneys of that Court, but that the defendant had employed them, and

(a) 2 Brod. &amp; Bingham, 11.

(b) *Ante*, 760.

they had undertaken with him to do the business there for him, for reward to be paid to them, and they had then employed an attorney of the Court on their own credit;—there could have been no objection to the action by both for the reward. It would have been like the case of attorneys, who, upon their own credit, employed a proctor in the Spiritual Courts, or, before the recent alterations (a), a clerk in court in the Exchequer, and who certainly might have sued their own client for their bill. If so, it can make no difference that one of the plaintiffs is the person who himself transacts the business in the particular Court, where the contract is clearly with both.

We are of opinion therefore that this action will lie; and the rule must be absolute to enter a verdict for the plaintiffs.

Rule absolute.

(a) By 1 W. 4, c. 70, s. 10.

JOHN NURSE and MARY ELIZABETH his Wife and others  
v. WILLS, Gent. one &c.

**ASSUMPSIT.** The first count of the declaration stated, that by an agreement made between the plaintiffs and the defendant, after reciting that one *J. Lang* had been sued by and arrested at the suit of the plaintiffs, by virtue of process returnable in the King's Bench in Michaelmas term, 1830, and that upon such arrest the defendant became bail below of *Lang*, and together with *Lang* did duly execute a bail bond to the sheriff in whose bailiwick *Lang* was so arrested, that is to say, the sheriff of Middlesex; and that after the execution of the same bond, *J. B. Brittain* and *J. Daniell* were put in, as bail above for *Lang*, and notice was given that they would duly justify themselves on Monday, the 15th November, in the year last aforesaid, but that they

In assumpsit by *A.* and *B.* his wife, and *C.*, against *D.*, a cognovit by *D.* admits that the wife is interested and that she is properly joined; and *A.*, *B.* and *C.* may join in an action against *E.* upon a special promise by *E.* to pay the debt or render *D.*, in consideration of an agreement by *A.*, *B.* and *C.* to forbear proceedings upon the cognovit.

1833.  
ARDEN  
v.  
TUCKER.



1833.

NURSE  
v.  
WILLS.

therein made default and the condition of the bail bond had been broken, and that *Lang* had confessed the action and damages to the amount of 200*l.*, and had consented that judgment should be forthwith entered up, and that execution should issue for 157*l.* 15*s.* 2*d.*, being the amount of debt and costs due to the plaintiffs from *Lang*, and that the defendants had requested the plaintiffs to allow *Lang* to be at large and to forbear entering up judgment on the said cognovit or taking out execution thereon, or taking any further proceedings in the suit against the bail, sheriff, or otherwise, until the 20th day of February then next, upon the defendant's guaranteeing to them the security of the person of *Lang* at the termination of such period, provided the said 157*l.* 15*s.* 2*d.* were not before then discharged and satisfied. It was, therefore, thereby understood and agreed by and between the parties to the said agreement, and the defendant undertook and promised, that in consideration that the plaintiffs would not enter up judgment or sue out execution as aforesaid, or proceed further in the suit, or take any further steps therein either against *Lang*, the sheriff, or the bail, before or until the 20th day of February, 1831, between the hours of ten and four, he the defendant would between those hours duly render *Lang*, or cause him to be rendered, into the custody of the marshal, so that the plaintiffs might thenceforth have the full security of the body of *Lang* for their said debt and costs, or in default thereof that he, the defendant, would then pay to the plaintiffs, or to *Harris* for them, the said 157*l.* 15*s.* 2*d.* And the said agreement being so made and entered into, afterwards and before the day on which *Lang* was so to be rendered as aforesaid, ss. on the 15th of February, 1831, it was further agreed, that the time for rendering *Lang* should be extended until and upon the first day of Easter term, it being fully understood, and defendant, in consideration of the promise and of such extension, did promise and agree that such extension should be without prejudice to the defendant's guarantee, that is to say, that the defendant should and

would duly render *Lang*, or cause him to be rendered, on the first day of Easter term; in manner and form and between the hours in the first-mentioned agreement in that behalf mentioned, or in default thereof that he should and would then pay to the plaintiffs, or to *Harris* for them, the said 137*l.* 10*s.* 8*d.* The count then stated an agreement for a further extension of time until the first day of Trinity term. Averment of performance on the part of the plaintiffs. Breach: that the defendant did not nor would abide by or keep any of the agreements and promises so by him made and entered into as aforesaid, and did not nor would, on any of the said days so respectively named and fixed for the render of *Lang*, render him or cause him to be rendered between the times in that behalf aforesaid, or in any other manner or at any other time; nor hath he paid to the plaintiffs or to any of them, or to *Harris* for them, the said debt and costs: by reason whereof the plaintiffs have been deprived of the security of the body of *Lang* for the same debt and costs. In a second count the two extensions of time are omitted, and it is stated that in consideration that the plaintiffs would not enter up judgment or sue out execution or proceed further in the suit against *Lang*, the sheriff or the bail, until the 20th of February, the defendant would duly render *Lang* into custody, or in default pay the debt and costs. Breach assigned as in the first count. Plea: non-assumpsit.

At the trial before Lord *Tenterden*, C. J., on the 17th of May, 1832, a verdict was found for the plaintiff for 300*l.* In Trinity term following, *White* had obtained a rule nisi to arrest the judgment; against which,

*F. Kelly* and *Hayward* now shewed cause. Though the promise in the first count is not stated to be made to the plaintiffs, the agreement which forms the foundation of the *assumpsit* is stated to be with them, and the promise, after verdict, must be taken to be so too. At all events the promise is stated as a promise to pay to all the plaintiffs.

1833.

NORSE  
v.  
WILLS.

First point:  
Omission of  
statement to  
whom promise  
made.

1833.

NURSE

v.

WILLS.

Second point:  
Misjoinder of  
wife.

It is also clear, upon the face of the declaration, that the wife had an interest in the subject-matter of the promise. She was a party to the original suit, which would consequently have survived to her, and the *cognovit* also admits a cause of action in her. In the present case, therefore, there is a consideration moving *from* the wife, and an express promise *to* her; and the following cases clearly establish that wherever both these incidents combine (some of the cases even going the length of deciding that an interest in the wife or an express promise to her is enough to justify her being joined,) the wife may be made a party. *Huggins v. Durham* (a), *Brashford v. Buckingham* (b), *Prat v. Taylor* (c), *Philliskirk v. Pluckwell* (d); and see the judgment of Holt, C. J. in *Yard v. Eland* (e).

*F. Kelly* afterwards referred to *Richards v. Richards* (f).

Second point.

*Campbell, S. G. and White*, contra.—The wife is improperly joined; for, in the first place, it does not sufficiently appear that the wife was interested in the *original* action. Suppose the promise in the original action had been stated to have been made to the husband *and wife*, it would have been a ground for arresting the judgment; *Abbott and wife v. Blofield* (g), *Bidgood v. Way and wife* (h). It is admitted that in the case of bonds and promissory notes given to the wife, she may join; since she is interested, and the consideration is presumed to move from her. In *Philliskirk v. Pluckwell* (i), which was a case on a promissory note given to the wife during coverture, and in which it was argued that the wife was improperly joined, Lord *Ellenborough* said, "If it had been necessary to state a consideration, there might have been weight in the argument; but here is not the wife

(a) 2 Stra. 736.

(b) Cro. Jac. 205; *ante*, 254, 9.

(c) Cro. El. 61; *ante*, 224.

(d) 2 Maule & Selw. 393.

(e) 1 Ld. Raym. 368.

(f) 2 Barn. & Adol. 447.

(g) Cro. Jac. 644.


(h) 2 Bla. Rep. 1236.

(i) 2 Maule & Selw. 393. *Et vide ante*, 254.

the meritorious cause of action?" It is necessary, therefore, to state a consideration, and that consideration moves in this case from the husband, for the forbearance is by him alone. In *Rumsey v. George (a)*, Lord *Ellenborough* said, "a consideration of forbearance by the husband is a consideration arising during coverture, and expressly moving from the husband, who has the power of immediately enforcing the claim, and is therefore sufficient to support a promise made to him alone, who is the instrument of forbearance." [Parke, J. The cognovit to all the plaintiffs is an admission of the interest of the wife]. Granting that it is to be presumed that the wife had an interest in the original action, the objection still remains that this is an executory contract, and that the consideration moves from the husband alone. The words of the promise are, "and the defendant undertook and promised, in consideration that the plaintiffs should not nor would enter up judgment," &c. without saying to whom the defendant promised. In *Buckley v. Collier (b)*, it was held that the wife ought not to be joined in an action for work done by her during coverture, unless there be an express promise to her. [Parke, J. It is to be presumed after verdict, from the declaration in this case, that the promise was between the parties to the agreement.] Waiving that objection, the promise to forbear must be taken to have been made by the husband alone, as the wife could make no contract. In *Smith v. The Sheriff of Middlesex (c)*, *Le Blanc, J.* said, "It is contended that either Mrs. *East* or her husband took it, (the property in the goods in dispute,) but she being a married woman could make no contract. [Parke, J. There is no doubt that a married woman can make no contract.] Then the contract is not binding on the party from whom the consideration is supposed to have moved. [Parke, J. May not the declaration be treated as if the wife's agreement had been entirely omitted?]. If it be so, the wife must be considered as

1833.  
NURSE  
v.  
WILLS.

(a) 1 Maule & Selw. 176. 63; 4 Mod. 106; Carth. 251.  
(b) 1 Salk. 198; S. C. 3 Salk. (c) 15 East, 611.

1868.  
  
 NURSE  
 v.  
 WILLS.

having been improperly joined. In *Yard v. Eland* (a), it was held, that on a promise to a husband to pay money to the wife as executrix, in consideration of his forbearing to sue for it, the husband may sue alone, the wife not being a party to the agreement, *Holmes and wife v. Wood* (b). [*Parke, J.* referred to *Brashford v. Buckingham* (c).] The reason for the joinder of the wife in any case is, that she has an interest in the cause of action, which would survive to her after her husband's death.—*Com. Dig.* Baron and Feme, (F. 10.) Here, if the contract to forbear had been broken in the life-time of her husband, the wife could not have been sued, and therefore the action on the contract, of which the forbearance is the consideration, would not have survived to her, but the executors of the husband must have sued.

In Easter term DENMAN, C. J. delivered the judgment of the Court.

This case came before the Court on a motion in arrest of judgment after verdict. It was an action by *Nurse* and his wife and three others on an agreement between them and the defendant, which recited that one *James Laing* had been arrested at the suit of the plaintiffs, that the defendant had become bail to the sheriff, that *Laing* had confessed the action, and that the plaintiffs had sustained damage to the amount of 200*l.*, and had consented that judgment should be entered up and execution should issue for the debt and costs due to the plaintiffs; and it was stated in the declaration to have been agreed between the plaintiffs and the defendant, and that the defendant undertook and promised, in consideration that the plaintiffs should not nor would enter up judgment, or sue out execution, or proceed further in the suit, or take any steps therein against *Laing*, the sheriff, or the bail, until a certain day, that the defendant should render *Laing* on that day, so that the plaintiffs might have the full security of his body, or in default should pay to the plain-

(a) 1 *Ld. Raymond*, 368.

(b) Cited 2 *Wils.* 424.

(c) *Cro. Jac.* 205.

1833.  
NURSE  
v.  
WILLS.

1877. 15s. 2d., being the debt and costs aforesaid. The declaration then proceeds to state a further agreement between the plaintiffs and defendant, that the time for rendering *Laing* should be extended to the first day of Easter term; it being fully understood (such are the terms of the declaration); and the defendant in consideration of *the premises and of such extension*, did promise and agree that he the defendant would render *Laing* on the last-mentioned day, or in default thereof would pay to the plaintiffs the above-mentioned sum, being the debt and costs aforesaid. The declaration then states a further agreement to extend the time, in similar terms, until the first day of Trinity term. It then states that the plaintiffs have not entered up judgment, or sued out execution, or proceeded further in the said suit, until the first day of Trinity term, or hitherto; and assigns for a breach, that the defendant has not rendered *Laing*, or paid the plaintiffs the said sum of money.

In a second count the two extensions of time are omitted; and it is stated that in consideration that the plaintiffs would not enter up judgment, or sue out execution, or proceed further in the suit against *Laing*, the sheriff or the bail, until the 20th February, the defendant promised that he would duly render *Laing* into custody, or, in default, pay the said sum to the plaintiffs, being the debt and costs in the said action; and a similar breach was assigned.

After a verdict for the plaintiffs, with general damages, it was urged for the defendant that one or both of these counts were bad.

It was argued that both the promises on extension of time in the first count were insufficiently stated, because no promise to the plaintiffs was averred in either; but on the argument the Court intimated its opinion, that as the agreement in both cases was stated to be *with the plaintiffs*, the promise must be taken after verdict to have been made to them (a).

First point:  
No promisee.

(a) Acc. *Bancks v. Camp*, 9 734. Et vide *Price v. Easton*, Bingham 604; 2 Moore & Scott, ante, 303.

1833.

NURSE  
v.  
WILLS.

Second point:  
Misjoinder of  
wife.

It was then objected, that even supposing the allegation in the declaration to amount to a statement of a promise made to the plaintiffs, still the count was bad in law.

It was not disputed that where a wife is the meritorious cause of action, or there is a consideration moving from her, the husband and wife *may* join—that they might have joined in an action upon a judgment obtained by both; but it was insisted, first, that a joint interest in the wife was not stated with sufficient clearness; and secondly, that as the consideration in this case was an *agreement* by the wife (jointly with her husband and others), and as she was incompetent to *agree* in point of law, the consideration was altogether void.

First objection  
to joinder of  
wife.

The first objection was disposed of by the Court in the course of the argument. It is clear that the cognovit by *Laing* to *all the plaintiffs*, which is recited in and admitted by the agreement, is a sufficient admission by the defendant of a joint interest in the wife.

Second objection  
to joinder  
of wife.

With respect to the second objection, the agreement by the wife is undoubtedly void; but it does not follow that the count is therefore bad. It states an agreement by all, and then a promise by the defendant in consideration of the plaintiff not taking out execution until a certain time. Supposing all mention of the *agreement* had been omitted, and the count had stated that the defendant had promised to pay to the plaintiffs, in consideration that they should not nor would take out execution until that time, and that no execution was accordingly taken out, would not such a count have been good? Or supposing that the mention of the wife's agreement had been omitted, and that of the other parties had been stated, and that the consideration for the promise had been alleged as before to be the forbearance of the plaintiffs to sue out execution, would such a count be objectionable? In either case the forbearance by all is a sufficient consideration for the promise, and it is not rendered less sufficient by the addition of the agreement of all, which, in point of law, would be binding on all the plaintiffs except the wife.

The same reason applies to the other parts of the first count, which state the agreements of all to extend the time, and the promise by the defendant in consideration of the premises, that is, of such agreement and of such *extension*.

In each part there is a sufficient consideration *moving from the wife*, as well as the other plaintiffs, namely, the forbearance by all, and the extension of the time by all; and this cannot be vitiated by the additional averment that all *agreed*, which, on the face of the declaration, would amount in law to the agreement of all but the wife.

For these reasons we are of opinion that the first count is good; and if so, the second is equally unobjectionable.

Rule discharged (a).

(a) A writ of error having been brought, the judgment was affirmed in Cam. Scacc. E. T. 1834.

1833.  
NURSE  
v.  
WILLS.

THE KING v. ROLFE.

A RULE nisi for an information in the nature of a quo warranto had been obtained against *W. R. Rolfe*, who claimed to be a capital burgess of Sudbury, on the ground, that a majority of the aldermen, or of the capital burgesses, had not been present at the meeting at which the defendant, *Rolfe*, was supposed to be elected.

The affidavit of the relator, after stating the charter, alleged *on information and belief*, that on the 3d of September, 1827, the defendant was nominated a capital burgess, and on the 15th of October, 1827, was, at a court of the corporation, elected and sworn into the office. The affidavit then went on to state, that the proper number of aldermen and capital burgesses of the borough were not present at the election.

The affidavits filed in opposition to the rule, alleged that

On a rule nisi for an information in the nature of a quo warranto, the relator is bound by the day on which in his affidavit (though founded on information and belief) the election is alleged to have taken place; and if that day is mistaken, the defendant is not bound to shew a regular election on another day.



1833.  
  
 The KING  
 v.  
 ROLFE.

*Rolfe* was not nominated and elected on the 3d of September and the 15th of October, but that on those days the proper number of aldermen and burgesses were present.

Sir *James Scarlett* (with whom was *B. Andrews*) now shewed cause, and contended that as it was stated in positive terms that *Rolfe* was not nominated on the 3d of September, or elected on the 15th of October, the *prima facie* case made by the relator was answered, and that the defendant was not bound to shew what passed on the day of election.

*Campbell*, S. G., and *F. Kelly*, in support of the rule, argued that the affidavits in answer to the rule should have shewn that the election, whenever it took place, was in conformity with the charter; and that although the relator was bound to assign certain days of nomination and election, he was not tied down to the days stated.

By the COURT (a).—The days of nomination and election assigned in the affidavit of the relator were material. A *prima facie* case might have been made out by that affidavit to call on the defendant for an answer as to those particular days. An answer to that case has been given. A relator is not entitled to say, that *whenever* an officer may have been elected, he was unduly elected; he must state the time of election, and establish a *prima facie* case referable to that period. An officer *de facto* ought not to be required, on an application like this, to give an account of all that passed on the day of his election.

(a) *Denman*, C. J., *Littledale* and *Parke*, JJ.

1833.

## The KING v. SMITHSON.

**CAMPBELL**, S. G. had obtained, on the affidavit of the prosecutor only, a rule nisi for a criminal information against the defendant, which was discharged by consent with costs. In the course of the day he again moved for a rule nisi for a criminal information against the defendant for the same matter, and in support of the second application produced the affidavit of the prosecutor used on the former occasion, and also other additional affidavits in confirmation of it.

A rule nisi for a criminal information will not be granted where a former rule for the same matter, against the same defendant, has been discharged; although the second motion be made upon additional affidavits.

By the COURT (a).—We consider we have not the power to receive this second application. It would be dangerous to do so, as it would establish a precedent for a second inquiry in every case where a rule nisi for a criminal information had been discharged. According to the practice of the Court, when affidavits have been answered, it is not allowable to file affidavits in reply. Were we to entertain this application, that would indirectly be done. A party applying for a criminal information has great advantages. He has ample opportunity for collecting all the materials necessary for the application, and if he does not do that he must take the consequence. The prosecutor is not without remedy (b). It is not even suggested in this case that the defendant has obtained the discharge of the rule by collusion, but the only ground of this second application is, that the prosecutor on the first occasion was not supplied with sufficient materials. We cannot grant the rule on such a ground.

Rule refused.

(a) *Denman, C. J. Littlehale and Parke, JJ.* (b) By indictment.

1833.  
 ~~~~~  
 NURSE
 v.
 WILLS.

therein made default and the condition of the bail bond had been broken, and that *Lang* had confessed the action and damages to the amount of 200*l.*, and had consented that judgment should be forthwith entered up, and that execution should issue for 137*l.* 15*s.* 2*d.*, being the amount of debt and costs due to the plaintiffs from *Lang*, and that the defendants had requested the plaintiffs to allow *Lang* to be at large and to forbear entering up judgment on the said cognovit or taking out execution thereon, or taking any further proceedings in the suit against the bail, sheriff, or otherwise, until the 20th day of February then next, upon the defendant's guaranteeing to them the security of the person of *Lang* at the termination of such period, provided the said 137*l.* 15*s.* 2*d.* were not before then discharged and satisfied. It was, therefore, thereby understood and agreed by and between the parties to the said agreement, and the defendant undertook and promised, that in consideration that the plaintiffs would not enter up judgment or sue out execution as aforesaid, or proceed further in the suit, or take any further steps therein either against *Lang*, the sheriff, or the bail, before or until the 20th day of February, 1834, between the hours of ten and four, he the defendant would between those hours duly render *Lang*, or cause him to be rendered, into the custody of the marshal, so that the plaintiffs might thenceforth have the full security of the body of *Lang* for their said debt and costs, or in default thereof that he, the defendant, would then pay to the plaintiffs, or to *Harris* for them, the said 137*l.* 15*s.* 2*d.* And the said agreement being so made and entered into, afterwards and before the day on which *Lang* was so to be rendered as aforesaid, ss. on the 15th of February, 1831, it was further agreed, that the time for rendering *Lang* should be extended until and upon the first day of Easter term, it being fully understood, and defendant, in consideration of the promises and of such extension, did promise and agree that such extension should be without prejudice to the defendant's guarantee, that is to say, that the defendant should and

1833.

NORRY
v.
WILLS.

would duly render *Lang*, or cause him to be rendered, on the first day of Easter term, in manner and form and between the hours in the first-mentioned agreement in that behalf mentioned, or in default thereof that he should and would then pay to the plaintiffs, or to *Harris* for them, the said 187l. 10s. 3d. The count then stated an agreement for a further extension of time until the first day of Trinity term. Averment of performance on the part of the plaintiffs. Breach: that the defendant did not nor would abide by or keep any of the agreements and promises so by him made and entered into as aforesaid, and did not nor would, on any of the said days so respectively named and fixed for the render of *Lang*, render him or cause him to be rendered between the times in that behalf aforesaid, or in any other manner or at any other time; nor hath he paid to the plaintiffs or to any of them, or to *Harris* for them, the said debt and costs: by reason whereof the plaintiffs have been deprived of the security of the body of *Lang* for the same debt and costs. In a second count the two extensions of time are omitted, and it is stated that in consideration that the plaintiffs would not enter up judgment or sue out execution or proceed further in the suit against *Lang*, the sheriff or the bail, until the 20th of February, the defendant would duly render *Lang* into custody, or in default pay the debt and costs. Breach assigned as in the first count. Plea: non-assumpsit.

At the trial before Lord *Tenterden*, C. J., on the 17th of May, 1832, a verdict was found for the plaintiff for 300*l*. In Trinity term following, *White* had obtained a rule nisi to arrest the judgment; against which,

R. Kelly and *Hayward* now shewed cause. Though the promise in the first count is not stated to be made to the plaintiffs, the agreement which forms the foundation of the *assumpsit* is stated to be with them, and the promise, after verdict, must be taken to be so too. At all events the promise is stated as a promise to pay to all the plaintiffs.

First point:
Omission of
statement to
whom promise
made.

1833.

NURSE

v.

WILLS.

Second point:
Misjoinder of
wife.

It is also clear, upon the face of the declaration, that the wife had an interest in the subject-matter of the promise. She was a party to the original suit, which would consequently have survived to her, and the *cognovit* also admits a cause of action in her. In the present case, therefore, there is a consideration moving from the wife, and an express promise to her; and the following cases clearly establish that wherever both these incidents combine (some of the cases even going the length of deciding that an interest in the wife or an express promise to her is enough to justify her being joined,) the wife may be made a party. *Huggins v. Durham* (a), *Brashford v. Buckingham* (b), *Prat v. Taylor* (c), *Philliskirk v. Pluckwell* (d); and see the judgment of Holt, C. J. in *Yard v. Eland* (e).

F. Kelly afterwards referred to *Richards v. Richards* (f).

Second point. *Campbell, S. G. and White*, contra.—The wife is improperly joined; for, in the first place, it does not sufficiently appear that the wife was interested in the *original* action. Suppose the promise in the original action had been stated to have been made to the husband *and wife*, it would have been a ground for arresting the judgment; *Abbott and wife v. Blofield* (g), *Bidgood v. Way and wife* (h). It is admitted that in the case of bonds and promissory notes given to the wife, she may join; since she is interested, and the consideration is presumed to move from her. In *Philliskirk v. Pluckwell* (i), which was a case on a promissory note given to the wife during coverture, and in which it was argued that the wife was improperly joined, Lord *Ellenborough* said, "If it had been necessary to state a consideration, there might have been weight in the argument; but here is not the wife

(a) 2 Stra. 736.

(b) Cro. Jac. 205; *ante*, 254, 9.

(c) Cro. El. 61; *ante*, 224.

(d) 2 Maule & Selw. 393.

(e) 1 Ld. Raym. 368.

(f) 2 Barn. & Adol. 447.

(g) Cro. Jac. 644.

(h) 2 Bla. Rep. 1236.

(i) 2 Maule & Selw. 393. *Et*

vide ante, 254.

the meritorious cause of action?" It is necessary, therefore, to state a consideration, and that consideration moves in this case from the husband, for the forbearance is by him alone. In *Rumsey v. George* (a), Lord *Ellenborough* said, "a consideration of forbearance by the husband is a consideration arising during coverture, and expressly moving from the husband, who has the power of immediately enforcing the claim, and is therefore sufficient to support a promise made to him alone, who is the instrument of forbearance." [Parke, J. The cognovit to all the plaintiffs is an admission of the interest of the wife]. Granting that it is to be presumed that the wife had an interest in the original action, the objection still remains that this is an executory contract, and that the consideration moves from the husband alone. The words of the promise are, "and the defendant undertook and promised, in consideration that the plaintiffs should not nor would enter up judgment," &c. without saying to whom the defendant promised. In *Buckley v. Collier* (b), it was held that the wife ought not to be joined in an action for work done by her during coverture, unless there be an express promise to her. [Parke, J. It is to be presumed after verdict, from the declaration in this case, that the promise was between the parties to the agreement.] Waiving that objection, the promise to forbear must be taken to have been made by the husband alone, as the wife could make no contract. In *Smith v. The Sheriff of Middlesex* (c), *Le Blanc, J.* said, "It is contended that either Mrs. East or her husband took it, (the property in the goods in dispute,) but she being a married woman could make no contract. [Parke, J. There is no doubt that a married woman can make no contract.] Then the contract is not binding on the party from whom the consideration is supposed to have moved. [Parke, J. May not the declaration be treated as if the wife's agreement had been entirely omitted?]. If it be so, the wife must be considered as

1833.


NURSE
v.
WILLS.

(a) 1 Maule & Selw. 176.

63; 4 Mod. 106; Carth. 251.

(b) 1 Salk. 198; S. C. 3 Salk.

(c) 15 East, 611.

1868.

 NURSE
 v.
 WILLS.

having been improperly joined. In *Yard v. Eland* (a), it was held, that on a promise to a husband to pay money to the wife as executrix, in consideration of his forbearing to sue for it, the husband may sue alone, the wife not being a party to the agreement, *Holmes and wife v. Wood* (b). [*Parke, J.* referred to *Brashford v. Buckingham* (c).] The reason for the joinder of the wife in any case is, that she has an interest in the cause of action, which would survive to her after her husband's death.—*Com. Dig.* Baron and Fease, (F. 10.) Here, if the contract to forbear had been broken in the life-time of her husband, the wife could not have been sued, and therefore the action on the contract, of which the forbearance is the consideration, would not have survived to her, but the executors of the husband must have sued.

In Easter term DENMAN, C. J. delivered the judgment of the Court.

This case came before the Court on a motion in arrest of judgment after verdict. It was an action by *Nurse* and his wife and three others on an agreement between them and the defendant, which recited that one *James Laing* had been arrested at the suit of the plaintiffs, that the defendant had become bail to the sheriff, that *Laing* had confessed the action, and that the plaintiffs had sustained damage to the amount of 200*l.*, and had consented that judgment should be entered up and execution should issue for the debt and costs due to the plaintiffs; and it was stated in the declaration to have been agreed between the plaintiffs and the defendant, and that the defendant undertook and promised, in consideration that the plaintiffs should not nor would enter up judgment, or sue out execution, or proceed further in the suit, or take any steps therein against *Laing*, the sheriff, or the bail, until a certain day, that the defendant should render *Laing* on that day, so that the plaintiffs might have the full security of his body, or in default should pay to the plain-

(a) 1 *Ld. Raymond*, 368.

(c) *Cro. Jac.* 205.

(b) Cited 2 *Wils.* 424.

1833.
NURSE
v.
WILLS.

tiffs 187l. 15s. 2d., being the debt and costs aforesaid. The declaration then proceeds to state a further agreement between the plaintiffs and defendant, that the time for rendering *Laing* should be extended to the first day of Easter term; it being fully understood (such are the terms of the declaration); and the defendant in consideration of the premises and of such extension, did promise and agree that he the defendant would render *Laing* on the last-mentioned day, or in default thereof would pay to the plaintiffs the above-mentioned sum, being the debt and costs aforesaid. The declaration then states a further agreement to extend the time, in similar terms, until the first day of Trinity term. It then states that the plaintiffs have not entered up judgment, or sued out execution, or proceeded further in the said suit, until the first day of Trinity term, or hitherto; and assigns for a breach, that the defendant has not rendered *Laing*, or paid the plaintiffs the said sum of money.

In a second count the two extensions of time are omitted; and it is stated that in consideration that the plaintiffs would not enter up judgment, or sue out execution, or proceed further in the suit against *Laing*, the sheriff or the bail, until the 20th February, the defendant promised that he would duly render *Laing* into custody, or, in default, pay the said sum to the plaintiffs, being the debt and costs in the said action; and a similar breach was assigned.

After a verdict for the plaintiffs, with general damages, it was urged for the defendant that one or both of these counts were bad.

It was argued that both the promises on extension of time in the first count were insufficiently stated, because no promise to the plaintiffs was averred in either; but on the argument the Court intimated its opinion, that as the agreement in both cases was stated to be with the plaintiffs, the promise must be taken after verdict to have been made to them (a).

First point:
No promisee.

(a) Acc. *Bancks v. Camp*, 9 734. Et vide *Price v. Easton*, Bingham, 604; 2 Moore & Scott, ante, 303.

1833.

NURSE

v.

WILLS.

Second point:
Misjoinder of
wife.

It was then objected, that even supposing the allegation in the declaration to amount to a statement of a promise made to the plaintiffs, still the count was bad in law.

It was not disputed that where a wife is the meritorious cause of action, or there is a consideration moving from her, the husband and wife *may* join—that they might have joined in an action upon a judgment obtained by both; but it was insisted, first, that a joint interest in the wife was not stated with sufficient clearness; and secondly, that as the consideration in this case was an *agreement* by the wife (jointly with her husband and others), and as she was incompetent to *agree* in point of law, the consideration was altogether void.

First objection
to joinder of
wife.

The first objection was disposed of by the Court in the course of the argument. It is clear that the cognovit by *Laing to all the plaintiffs*, which is recited in and admitted by the agreement, is a sufficient admission by the defendant of a joint interest in the wife.

Second objection
to joinder
of wife.

With respect to the second objection, the agreement by the wife is undoubtedly void; but it does not follow that the count is therefore bad. It states an agreement by all, and then a promise by the defendant in consideration of the plaintiff not taking out execution until a certain time. Supposing all mention of the *agreement* had been omitted, and the count had stated that the defendant had promised to pay to the plaintiffs, in consideration that they should not nor would take out execution until that time, and that no execution was accordingly taken out, would not such a count have been good? Or supposing that the mention of the wife's agreement had been omitted, and that of the other parties had been stated, and that the consideration for the promise had been alleged as before to be the forbearance of the plaintiffs to sue out execution, would such a count be objectionable? In either case the forbearance by all is a sufficient consideration for the promise, and it is not rendered less sufficient by the addition of the agreement of all, which, in point of law, would be binding on all the plaintiffs except the wife.

The same reason applies to the other parts of the first count, which state the agreements of all to extend the time, and the promise by the defendant in consideration of the premises, that is, of such agreement and of such extension.

In each part there is a sufficient consideration *moving from the wife*, as well as the other plaintiffs, namely, the forbearance by all, and the extension of the time by all; and this cannot be vitiated by the additional averment that all agreed, which, on the face of the declaration, would amount in law to the agreement of all but the wife.

For these reasons we are of opinion that the first count is good; and if so, the second is equally unobjectionable.

Rule discharged (a).

(a) A writ of error having been brought, the judgment was affirmed in Cam. Scacc. E. T. 1834.

THE KING v. ROLFE.

A RULE nisi for an information in the nature of a quo warranto had been obtained against *W. R. Rolfe*, who claimed to be a capital burgess of Sudbury, on the ground, that a majority of the aldermen, or of the capital burgesses, had not been present at the meeting at which the defendant, *Rolfe*, was supposed to be elected.

The affidavit of the relator, after stating the charter, alleged on information and belief, that on the 3d of September, 1827, the defendant was nominated a capital burgess, and on the 15th of October, 1827, was, at a court of the corporation, elected and sworn into the office. The affidavit then went on to state, that the proper number of aldermen and capital burgesses of the borough were not present at the election.

The affidavits filed in opposition to the rule, alleged that

On a rule nisi for an information in the nature of a quo warranto, the relator is bound by the day on which in his affidavit (though founded on information and belief) the election is alleged to have taken place; and if that day is mistaken, the defendant is not bound to shew a regular election on another day.

1833.

NURSE
v.
WILLS.

784 ADVERTISEMENT.

that *B.* should take *A.*'s mare to graze, and have her blistered:—Held, that *A.* could maintain an action against a chemist for selling ointment to *B.* which upon being applied injured the mare. *Phillips v. Wood.* Page 434

II. Proper Parties.

And see *BARON AND FEME*, 1.

6. The bailee of goods, sending them by a carrier to the bailor, may sue the carrier for negligence. *Freeman v. Birch.* 420

III. Joinder of Counts.

7. A count charging the defendant with having preferred a charge of felony against the plaintiff before a magistrate, and having, under a warrant to search the plaintiff's house for stolen goods, obtained upon such charge, entered the plaintiff's house, may be joined with counts in tort. *Hensworth v. Fowkes.* 321

ACTION ON THE CASE.

See *CASE*.

ADMINISTRATION.

See *EXECUTOR*.

ADMIRALTY.

See *INSOLVENT DEBTORS*, 4.

ADMISSIONS.

See *EVIDENCE*, 6.

ADVERSE POSSESSION.

See *EJECTMENT*, 5.

ADVOCATE TO THE ADMIRALTY.

See *INSOLVENT DEBTORS*, 4.

ADVERTISEMENT OF REWARD.

See *ASSUMPSIT*, 1.

ANNUITY.

AFFIDAVIT.

1. Title of affidavit, where cause and other matters referred. Page 102

AGENT.

See *ACTION*, 6.—*PRACTICE*, 4.

AGREEMENT TO PAY IN READY MONEY.

See *DEBTOR AND CREDITOR*, 4.

ALDERMAN.

See *CORPORATION*.

AMBIGUITY.

See *WILL*, 1, 2, 3, 4.

AMENDMENT.

I. To what Extent.

1. Under 9 *Geo.* 4, c. 15, a record may be amended pending the trial, by correcting a variance between a written contract and the statement of the contract on the pleadings, although it do not appear by the record that the contract was in writing. *Lancey v. Bishop.* 332

2. Refusal to amend mistake occasioned by gross negligence. 355, a.

II. At what Time.

3. After a lapse of seven terms the Court refused to permit an amendment by altering a count in trover for title deeds, into a count in detinue, adding a count in debt. *Green v. Milton.* 678

ANNUITY.

And see *CHARGE ON BENEFICE*, 1.—*EJECTMENT*, 5.

I. Consideration of Grant.

1. Grant of annuity for past services. 216, 217

II. How secured.

2. A warrant of attorney, the discharge to which recites that it is given to secure the payment of an

APPEAL.

annuity, and authorizes the plaintiff to issue a fi. fa. de bonis ecclesiasticis for arrears, *but does not state that it is given for the purpose of charging the defendant's ecclesiastical living*, is valid, though it refers to the annuity deed of the same date, in which that object is distinctly avowed. *Colebrooke v. Layton.* Page 375

APOTHECARY.

See PHYSICIAN, I.

APPEAL.

And see EAST INDIA COMPANY, 4.

I. Notice.

1. After an appeal against a poor-rate has been respited at the instance of the respondents, the appellant cannot be called upon to prove his notice of appeal. *Rex v. Justices of Hertfordshire.* 331
2. An order of removal made from the parish of *A.* to the parish of *B.* (in which are two townships, *C.* and *D.*, each having separate overseers and maintaining its own poor,) is served upon the overseers of *C.*, to whom the paupers are delivered. An appeal against this order is entered and respited as the appeal of the churchwardens and overseers of *B.* A notice of trial for the subsequent sessions, given in the name of the overseers of the township of *C.* as appellants against an order made upon the overseers of the township of *C.*, in the parish of *B.*, is sufficient. *Rex v. Justices of Carmarthen.* 369
3. A notice of appeal under 55 Geo. 3, c. 68, against an order for the diversion of a highway, must shew that the person intending to appeal is a party aggrieved by the order. *Rex v. Justices of the West Riding of Yorkshire.* 426
4. The grievance to the appellant is sufficiently shewn by stating that

ARBITRAMENT. 785

he is obliged to use a more circuitous road. Page 426

5. The ten days' notice of appeal under the act must be computed one day inclusive and one day exclusive. *Ibid.*
6. The computation is not affected by a rule of the Court of Quarter Sessions, which requires ten days notice of appeal, exclusive as well of the day of service as of the first day of the sessions. *Ibid.*

APPRENTICE.

And see SETTLEMENT, I.

I. Validity of Binding.

1. A special authority delegated by a local act to the directors and acting guardians, forming part of a body incorporated for the government of the poor of a district, to bind out apprentices, must be executed by an indenture to which the seals of the apprenticing directors and acting guardians are affixed. The corporation seal is insufficient. *Rex v. Inhabitants of Haughley.* 525
2. And where authority is given to the corporation to bind out, an indenture under the corporate seal, but purporting to be made between the directors and acting guardians and the master, is invalid. *Ibid.*

ARBITRAMENT.

And see AWARD, 1.

I. Duration of Authority.

1. The death of the defendant after an award in pursuance of a rule of Court, where no verdict has been entered up, abates the suit; the Court will not enforce the performance of the award by attachment. *Maffey v. Godwyn.* 101

II. Award.

2. Where cross-actions and all matters in difference are referred to

arbitration, and the award decides the actions only, it is no objection to the award that a claim not included in either action was brought before the arbitrator, upon which he *has not adjudicated*, unless it be also averred (that he *did not take such claim into his consideration*.
Res v. St. Katharine Dock Company.

Page 121

ARREST.

See COSTS, I.

1. The Court will not set aside an arrest upon the merits, unless it be clear from the affidavits that the plaintiff could not have had any cause of action. *Burton v. Haworth and another.* 318
2. *Semble*, that the circumstance of the action being brought for purposes of intimidation, would not be a ground for such interference.

Ibid.

ARREST OF JUDGMENT, 329, 455.

ASSENT.

See CORPORATION, 4, 17, 18.—
RELATION, 1.

ASSETS.

See EXECUTOR, I.

ASSIGNMENT.

I. *Of Breaches.*

See BOND, 1.

II. *Of Debt.*

See BANKRUPT, 6, 7, 8.

III. *Of Term.*

See EJECTMENT, 3.—EXECUTORS, 4.

ASSUMPSIT.

And see ACTION, 1, 2, 3, 4, 5, 6.—
BARON AND FEME, 2, 3.

1. A reward offered by hand-bill to any person who shall disclose facts leading to a conviction for a felony

ATTORNEY.

may be claimed by a person, who, having notice of the hand-bill, makes the disclosure solely from motives of revenge against the felon. *Mary Anne Williams v. Carwardine.* Page 418

2. A count in assumpsit, stating a promise to pay a sum of money to the plaintiff, without alleging to whom the promise was made, is insufficient. *Price v. Easton.* 303
3. *Secus*, where the allegation of the promise is accompanied with a statement of an agreement to the same effect between the parties. *Ibid.*

ATTACHMENT.

See ARBITRAMENT, 1.

ATTORNEY.

See COUNTY, 2.—INSOLVENT, 1.—
LIBEL, 2.

I. *Admission.*

1. Form of oath on admission. 357, n.

II. *Lien.*

2. The mortgagee's attorney having possession of the title deeds, has a lien upon such deeds for costs due to him from the mortgagee. *Ogle v. Story, Gent. one &c.* 474

III. *Liability.*

3. Where an attorney, employed by both the vendor and purchaser, receives the purchase money, and omits to pay it over, and afterwards became a bankrupt, and obtains his certificate, the Court will not make a rule compelling him to pay the amount unless fraud be shewn. *In re Bonner, Gent. one &c.* 555
4. An attorney is not liable for the consequences of a mistake in a point of law, upon which a reasonable doubt may be entertained. *Kemp v. Burt.* 262

IV. *Client, how far bound by act of.*

5. A letter written before action brought, but with reference to the

ATTORNEY.

subject in dispute, by a person who is afterwards the defendant's attorney on the record, cannot be read as evidence of a fact admitted in such letter without further proof of authority to make such admission. *Wagstaff and another v. Wilson.* Page 4

V. Duty of, towards Client.

6. An attorney with whom deeds are deposited, in order to enable him to obtain money for the party depositing, is bound to inform his client where such deeds are. *Wilmot, Gent. v. Elkington.* 730
7. An attorney with whom deeds are deposited places them, without his client's knowledge, in the hands of a party from whom he has borrowed money for his client, being applied to by the latter on the subject is unable to inform him where the deeds are, the attorney is chargeable with having *mislaid* such deeds. *Ibid.*

VI. Bills of Costs.

8. Bills for business done, in what Courts taxable. 361, 363, 365, 367
9. Held, that an attorney's bill for business done in the County Court is taxable. *Wardle, Gent. one &c. v. Nicholson.* 365
10. Taxable items. 365
11. The preparing of a replevin bond is business done in the County Court. *Ibid.*
12. Severance, in bill, of items taxable and untaxable. 359, 360, 4, 6, 7
13. Delivery of bill. *Ibid.*
14. No taxing officer in County Court. 359

15. A. employs B. and C., attorneys and partners, to defend an action in the Palace Court, of which Court B., and not C., is admitted an attorney.—C. may join with B. in suing A. for the amount of the bill of costs. *Arden v. Tucker.* 5

Vii. Re-admission.

16. The Court will, upon payment of

BAIL BOND. 787

a moderate fine, re-admit an attorney, who has inadvertently practised without a certificate, through the omission of a clerk usually employed to take it out. *Ex parte Rigby.* Page 593

VIII. His Privileges in respect of his Clients.

17. Attorneys are entitled to be admitted to the interior of the King's Bench Prison, when they have occasion to go there for the benefit of clients confined in the prison, or when they are sent for by such clients. *In re William Jones, Esq. Marshal of the King's Bench Prison.* 128
18. But the Court will not make a general order upon the Marshal to permit an attorney to go into the interior at all times to visit his clients. *Ibid.*

AUCTION.

1. The highest bidder is bound by the entry in the sale book by the auctioneer's clerk, made in his presence, upon his name being called out as the purchaser, even in an action brought by the auctioneer. *Bird v. Boulter.* 313

AUCTIONEER.

See AUCTION, 1.

AWARD.

See ARBITRAMENT, II.

BAIL BOND.

1. Action by the sheriff's assignee to be brought in Court out of which the bailable process issued. 699
2. Whether action by sheriff himself is restricted to same Court, *qu.* *Ibid.*
3. A bail-bond taken under an attachment for not putting in an answer, cannot be assigned. *Meller v. Palfreyman.* 690

4. The creditor's remedy is by action in the name of the sheriff.

Page 696

BAILEE.

See CASE, ACTION ON THE, 9.

BAILIFF.

See EVIDENCE, 13.—TENDER, 2.

BAILMENT.

I. Pledge.

See DEBTOR AND CREDITOR, 1, 2, 3.

BANKERS.

See BILLS, 5.

BANKRUPT.

And see PARTNER, 4, 5.

I. Cases upon Sections 2 & 3 of 6 Geo. 4, c. 16.

1. An indictment for a conspiracy to embezzle the goods of a bankrupt, must state the trading, the petitioning creditor's debt, and the becoming bankrupt. *Rex v. Evan Owen Jones and others.* 78
2. It is not sufficient to state that a commission issued under which the party was duly found and declared to be a bankrupt. *Ibid.*

II. Cases upon Section 72.

3. Where a debt is assigned, the assignor must be considered as continuing (within the purview of the bankrupt acts) to have the order and disposition of the debt until notice to the debtor of the assignment. *Dean and another v. James.* 392
4. So, where one of two co-debtors releases his interest to his companion. *Ibid.*
5. An allegation in pleading that a debt has been assigned, does not import that notice of the assignment has been given to the debtor. *Ibid.*

III. Cases upon Section 81.

6. *A.* at Liverpool having consign-

ed goods to *B.* at Bahia, for sale on *A.*'s account, draws bills on *B.* to be paid out of the produce of the consignment. *A.* negotiates the bills with *C.* in London. Upon *B.*'s refusing to accept the first of the bills which is presented, *A.* directs *B.* to hand over to *D.*, *C.*'s agent at Bahia, any property of *A.*'s which may be remaining in *B.*'s hands. Before this direction reaches Bahia, or is acted upon, *A.* becomes bankrupt. Afterwards, and more than two months before the commission, *C.*, by *D.*, receives the property from *B.*:—Held,* a tortious conversion. *Carvalho, Assignees, &c. v. Burn.* Page 700

7. Whether by such direction *C.* acquired any equitable lien upon the property, *quære.* *Ibid.*
8. Mode of calculating the two months. 53, 56, 58
9. Under a *fi. fa.* upon a judgment on a warrant of attorney, the sheriff seized at 11 o'clock on the 13th of August. Commission issued after 11 on the 13th of October. Sale was after issuing of commission:—Held,
- 1st, That the seizure was a *levying* within the 6 Geo. 4, c. 16, s. 81.
- 2ndly, That more than two months had elapsed between the seizure and the issuing of the commission.
- 3dly, That the execution was not within the 108th section. *Godson v. Sanctuary.* 52
10. Seizure under a writ of execution is a taking in execution within the section. 571

IV. Case upon Section 82.

11. *A.*, after a secret act of bankruptcy, buys goods of *B.* to be paid for at a future day. On that day *A.* delivers to *C.* undue bills for the amount, requesting *C.* to pay *B.* for the goods. *C.* discounts the bills and pays *B.* by a cheque on his bankers. This

* See *vide post*, TROVER, 1.

BANKRUPT.

payment is protected against the assignees, under a commission issued subsequently to such payment, on the antecedent act of bankruptcy. *Sham v. Batley.*

Page 751

V. Cases upon Section 108.

Et vide supra, 6.

12. A judgment on a warrant of attorney is not within the protection of 1 *Will.* 4, c. 7, s. 7, and therefore is within this section. *Crossfield v. Stanley.* 668

13. In assumpsit for money had and received against the sheriff, to recover the proceeds of a sale under a fi. fa. issued upon a judgment not protected by 1 *Will.* 4, c. 7, s. 7, the plaintiff was held liable where notice of an act of bankruptcy committed before the sale, and of a docket struck thereon, was committed to him when the sale was nearly completed, after which he received the proceeds and handed them over to the execution creditor. *Ibid.*

VI. Cases upon Section 126.

14. Where an attorney, employed by both vendor and purchaser, receives the purchase-money and omits to pay it over, and afterwards became a bankrupt and obtains his certificate, the Court will not make a rule compelling him to pay the amount, unless fraud be shewn. *Bonner, Gent., one &c. in re.* 555

15. Fraud in obtaining a certificate may be given in evidence in answer to the general plea of bankruptcy. *Horn v. Ion.* 627

VII. Cases upon Section 127.

16. Notwithstanding a certificate obtained before 6 *Geo.* 4, c. 16, under a second commission, which had not produced 1*s.* in the pound, the liability of the effects of the bankrupt, which existed at the time of the passing of that act, is not removed by the 127th section. *Carew v. Edwards.* 632

BARON AND FEME. 789

17. A certificate so obtained is therefore no absolute bar to an action brought on a debt prior to the second bankruptcy. *Page* 632

18. For this purpose a bankruptcy after a discharge under the Insolvent Debtors' Act, stands upon the same ground as a second bankruptcy; although the debt sought to be enforced be one which would have been discharged under the Insolvent Debtors' Act, but for the circumstance of its having been omitted by the insolvent in his schedule. *Ibid.*

VIII. Cases upon 1 *Will.* 4, c. 7, s. 7.

Vide supra, 12, 13.

IX. Case upon 1 & 2 *Will.* 4, c. 56, s. 42.

19. Though a concerted commission of bankrupt, or fiat in bankruptcy, is protected, a concerted act of bankruptcy is still a nullity. *Marshall v. Barkworth.* 279

BANNS.

See MARRIAGE, 1.

BARON AND FEME.

I. In what case both may sue.

1. Action does not lie at the suit of husband and wife for words slandering the wife in a trade carried on by her, it not being alleged that she was divorced a mensâ et thoro, or had a separate maintenance. *Saville and wife v. Sweeney.* 244

2. In assumpsit by A., and B. his wife, and C. against D., a cognovit by D. admits that the wife is interested and that she is properly joined in that action. *Nurse and others v. Wills.* 765

3. And A. B. and C. may join in an action against E. upon a special promise made by E. to pay the debt or render D. in consideration of agreement by A., B., and C. to forbear proceedings upon the cognovit. *Ibid.*

790 **BILLS AND NOTES.**

BASE FEE, 167, (78)

BASTARD,

See PAUPER, 1, 2, 3.

BEER.

See JUSTICES, 4.

BILLS AND NOTES.

See NEW TRIAL, 1.—VENDOR, 3.

I. When valid.

1. An instrument acknowledging a loan of money and promising repayment, and engaging to pay an unliquidated demand out of the interest, and to pay the principal and the remainder of the interest to the lender, his executors, administrators and assigns, is not a promissory note, and it is properly stamped with an agreement stamp. *Bolton, Administratrix, v. Dugdale, Excutrix.* Page 412

II. Consideration.

2. A promissory note given by a defendant in prison, after conviction for a misdemeanor and before sentence, in pursuance of a recommendation of the Court to compromise, is valid, although the Court is not apprised of the terms of the compromise, and although the costs of the prosecution are included in the note. *Kirk v. Strickwood.* 275

III. Presentment.

3. A holder of a bill carried it, when due, to the residence of the acceptor stated in the bill, found the house closed, and inquired for the acceptor in the neighbourhood but could not hear of him: Held, that the bill was dishonoured. *Hine v. Alley and another.* 433
4. The holder of a cheque is bound to present it for payment on the day following that on which he receives it. *Boddington v. Schencker.* 540
5. But if he pay it to his bankers before the hour at which the bankers,

CARRIER.

by presenting it at the clearing house, might obtain payment on the same day, the drawer is not discharged by the bankers omitting so to present it; although according to the custom of London it may be imperative upon the bankers, as between them and their customers, so to present it. Page 540

IV. Liability of Acceptor.

6. Whether drawer may sue acceptor for costs of action against former. 250

BILL OF EXCEPTIONS. 607

BOARD OF CONTROL.

See EAST INDIA COMPANY, 7, 8.

BOND.

I. Declaration on.

1. The breach of the condition of a bond, otherwise well assigned, is not vitiated by the superaddition of immaterial allegations. *Stothert v. Goodfellow.* 202

II. Covenous Bonds.

See FRAUDULENT CONVEYANCE, 2.

BREACH OF COVENANT TO REPAIR.

See WASTE, 2.

BROKER.

See TENDER, 2.

1. A stock-broker is a "broker" within 6 Ann. c. 16, and must be admitted by the Lord Mayor and Aldermen of London. *Clark, Chamberlain &c. v. Powell.* 492

BYE LAW.

See CORPORATION, III.

CARRIER.

I. Liabilities.

See CASE, ACTION ON THE, 2.

CHANGE OF VENUE.

CASE, ACTION ON THE.

I. *For Injuries to Real Property.*

1. Removal of partition, not waste. Page 8, n.
2. Case, as for dilapidations, does not lie against the executors of a prior incumbent for miscultivation of the glebe. *Bird, Clerk, v. Relfe and Wife.* 415
3. To support case by reversioner some destruction is necessary. 14
4. Reversioner cannot maintain an action against a stranger for acts of trespass on the land attended with no injury to the reversion, otherwise than as being committed in assertion of the claim of a right of way. *Baxter v. Taylor.* 10
5. Distinction between case by lessor, in the nature of waste, and case by reversioner for permanent injury to the inheritance. 13

II. *For Injuries to Personal Property.*

6. A., a manufacturer, uses the mark of B., thereby giving to articles manufactured by A. the appearance of being of the manufacture of B.; B. may maintain case against A. *Blotfield v. Payne.* 353
7. So, although the article so marked by A. be not inferior in quality to those manufactured by B. *Ibid.*
8. So, although no actual damage can be shown to have resulted to B. *Ibid.*
9. Bailee of goods sending them by a carrier to the bailor, may sue the carrier for negligence. *Freeman v. Birch.* 420

CERTIFICATE.

See ATTORNEY, 16—BANKRUPT, VI.
SETTLEMENT, 1.

CESTUI QUE TRUST.

See SET-OFF, 2.

CHANGE OF VENUE IN FELONY.

See VENUE, 1, 2.

COGNOVIT. 791

CHARGE ON BENEFICE.

See EJECTMENT, 3.

1. A warrant of attorney, the defeazance to which recites that it is given to secure the payment of an annuity, and authorizes the plaintiff to issue a fi. fa. de bonis ecclesiasticis for arrears, but does not state that it is given for the purpose of charging the defendant's ecclesiastical living, is valid, though it refer to the annuity deed of the same date in which that object is distinctly avowed. *Colebrooke v. Layton.*

Page 375

CHARTER.

1. Operation as a statute, of a charter granted in parliament. 302, n.

CHEQUE.

See BILL AND NOTE, 4, 5.—EVIDENCE, 2.

CHILD.

1. Whether designating an individual or a class. 667

CHURCHWARDEN.

See EVIDENCE, 9.

CLERGYMAN, 98.

See CHARGE ON BENEFICE, 1.—
NON-RESIDENCE, 1.

CLERK, 202, 255.

COAL MINES.

1. Ratability of. 198

COGNOVIT.

I. *Effect of.*

1. In assumpsit by A. and B. his wife, and C. against D., a cognovit by D. admits that the wife is interested and that she is properly joined; and A., B. and C. may join in an action against E. upon a special promise to pay the debt or render D., in consideration of an

792 CONSPIRACY.

agreement by *A.*, *B.* and *C.* to forbear proceedings upon the *cognovit. Nurse and others v. Wills. Page 765*

COMMITMENT.

See JUSTICES, 6, 7.

COMPANY.

See CORPORATIONS, 1.

COMPENSATION, 404, 548.

COMPOUNDING MISDEMEANOR.

1. A promissory note given by a defendant in prison, after conviction for a misdemeanor and before sentence, in pursuance of a recommendation of the Court to compromise, is valid, although the Court is not apprized of the terms of the compromise, and although the costs of the prosecution are included in the note. *Kirk v. Strickwood. 275*

COMPROMISE, 275.

See BILL and NOTE, 2—COMPOUNDING MISDEMEANOR, 1.

COMPUTATION OF TIME.

See APPEAL, 5—BANKRUPT, 3.

CONCERTED ACT OF BANKRUPTCY.

See BANKRUPT, 5.

CONCERTED COMMISSION.

See BANKRUPT, 5.

CONFIDENTIAL COMMUNICATION.

See LIBEL, 2.

CONSIDERATION.

See ASSUMPSIT, II.

CONSPIRACY, 78, 81.

1. Indictment against *B.* and *C.* for conspiring to extort money from the prosecutor *A.*, by means

COPYHOLD.

of a charge of forgery, in which indictment a letter written by *B.* in execution of the conspiracy, and charging *A.* with the forgery of a cheque on *C.*'s banker, is set out. The letter was given in evidence, as were also conversations referring to the cheque alleged to have been forged: Held, that the prosecutor was not bound to produce the cheque, though it appeared that such cheque was actually in existence. *Rex v. Ford and Aldridge. Page 776*

CONSTABLE.

See OFFICER, 1.

CONSTRUCTION.

I. *Of Statute.*

See STATUTE.

II. *Of Deeds.*

See EVIDENCE, 14.

III. *Of Licence to Work Mines.*

See LICENCE, 1.

IV. *Of Wills.*

See WILL, 1, 2, 3.

CONSTRUCTIVE SERVICE, 206.

CONTRACT.

See ACTION, 1, 2, 3.—SHIP, 1.

CONTRADICTION OF WITNESS.

1. By party calling him. 30

CONVICTION.

See FORCIBLE ENTRY, 1.

COPYHOLD.

I. *Customary Court.*

1. Customary court distinguished from court baron. 598, n.

II. *Admittance.*

2. *A.*, for a valuable consideration paid by *B.*, surrenders to such uses as *B.* shall appoint, and in de-

CORPORATION.

fault of appointment to *B.* in fee: *B.* appoints to *C.* *Seemle*, that the lord is bound to admit *C.* without requiring the previous admittance of *B.* *Rex v. The Lord of the Manor of Oundle.** Page 587

III. Surrender.

3. When a copyhold is surrendered out of court by deed, the copy of court roll is still evidence of the surrender, although 48 *Geo. 3, c. 149*, requires that in such cases the deed of surrender or memorandum thereof shall be stamped, and not the copy of court roll. *Doe d. Hawthorn v. Mee.* 424

IV. Devise.

4. A copyhold is surrendered to the use of *A.* for life, remainder to such person or persons, and for such estate or estates, as *A.* shall appoint by will, executed in the presence of and attested by three witnesses: remainder, in default of such appointment, to the use of *A.* in fee. After the passing of 55 *Geo. 3, c. 192*, *A.* devises to *B.* by a will executed in the presence of two witnesses only: Held, a good devise of the remainder in fee, and that the want of a surrender to the use of this will was aided by the statute. *Doe d. Hickman v. Hickman.* 780

CORPORATION.

I. Liability of.

1. Where an act incorporating a company directs that actions in respect of claims upon the company shall be brought against the treasurer, but that his effects shall not be taken in execution, a mandamus will issue to the directors, &c. of the company, commanding them to pay money recovered in such an action. *Rex v. St. Katharine Dock Company.* 121

* *Vide S. C. post*, vol. iii.

CORPORATION. 793

II. Powers of, how exercised.

2. Certain select members of a corporation, called directors and acting guardians, are empowered to execute deeds under the seal of the corporation. A deed executed under such power, must be expressed to be made by the corporation and not by the select body. *Rex v. Haughley.* Page 525
3. Held, that the directors of an incorporated manufacturing company, having the legal custody of the corporate seal, are authorized to affix it to an indenture granting an annuity, by way of retiring pension, to an officer of the company in consideration of past services, and subject to a proviso restricting the grantee from manufacturing or assisting in the manufacture of the particular article. *Clarke v. Imperial Gas Light Company.* 228
4. Held also, that where the charter of incorporation requires the assent of the corporate body, convened in a particular manner, to the affixing of the corporate seal by the directors, it lies upon the corporate body impugning the authority of the directors, repudiating their act in affixing the seal, and disclaiming the contract, to shew that no such assent was formally given. *Ibid.*

III. Bye-laws.

5. Where a charter of incorporation authorizes the corporators to elect a master *de seipsis*, a bye-law narrowing the body of electors is valid. *Rex v. Attwood.* 286
6. The existence of such a bye-law may, without the intervention of a jury, be judicially inferred from an ancient usage for the election to be so conducted. *Ibid.*
7. Though the bye-law would be void if it also lessened the number of persons eligible to the office, such a vice in the presumed bye-law will not be inferred from the

794 CORPORATION.

circumstance of the election by the limited body having almost uniformly fallen upon members of the limited body. *Page 286*

2. Nor will the Court, on that ground, give leave to file an information in the nature of a quo warranto, for the purpose of investigating the title of a master elected agreeably to such usage. *Ibid.*
3. It is no ground for refusing a mandamus to admit a party to an office to which he has been elected, that to a similar mandamus granted in respect of a former election of the same party a return was made, showing an excuse valid in point of law for not admitting him. *Res v. Mayor of London.* 287

IV. Incompatible Offices.

And see 113.

10. A statute directs the payment of county assessments to a person to be appointed by the justices county treasurer, he first giving sufficient security to the justices to be accountable to them for the moneys which he shall so receive. The giving of the security is not a condition precedent to the vesting of the office of treasurer in the person so appointed, or to his liability to account. *Res v. Patteson.* 612
11. An office of which the salary is to be fixed, and the accounts audited by certain justices, cannot be held by one of such justices. *Ibid.*
12. An alderman elected by the whole corporate body does not vacate his office by the acceptance of an incompatible office conferred upon him by a select body. *Ibid.*
13. Such second appointment is void, *semble.* *Ibid.*
14. A public officer cannot vacate his office by accepting an incompatible office. *Ibid.*
15. Unless the first be an office which he might have determined by his own act. *Ibid.*

COUNTY.

16. Or an office which he might have surrendered to the party appointing to the second office. *Page 612*

17. Or an office from which he might have been removed by or with the concurrence of the party appointing to such second office. *Ibid.*

COSTS.

See ATTORNEY, VI.

I. Upon Arrest without Cause.

1. A plaintiff arresting a defendant under a misapprehension of a doubtful point of law, is not liable to pay his costs under 43 Geo. 3, c. 46, s. 3. *Stevin v. Taylor.* 250

II. Upon setting aside Warrant of Attorney.

2. A rule to set aside a warrant of attorney, as given upon an illegal consideration, is in the nature of an application to set aside proceedings for irregularity, so as to entitle the party successfully resisting it to the costs of the application. *Ibid.*

III. Upon new Trial.

3. The rule as to the payment of costs on a motion for a new trial is the same in principle, in criminal and civil cases. *Res v. Ford and Aldridge.* 776
4. Where a judge left as a question for the jury, a point which, upon the evidence, could only be determined one way, and the jury found a verdict against the evidence, the Court refused to grant a new trial otherwise than upon payment of costs. *Doe v. Pika.* 365

COUNTER AFFIDAVIT, 318.

COUNTY.

And see 118.

I. Posse Comitatus.

See 61.

CRIMINAL INFORMATION.

II. County Court.

1. Jurisdiction of Court. Page 369
2. Appearance in, by attorney. 271
3. Judgment given in a County Court is not conclusive. 120
4. The existence of the facts necessary to the regularity of such judgment is a question for the jury, although a motion made in the County Court to set it aside for irregularity has been dismissed. *Thompson v. Blackhurst.* 266
5. Held, that an attorney's bill for business done in the County Court is taxable. *Wardle, Gent. one &c. v. Nicholson.* 355

III. County Rate.

See QUO WARRANTO.

COUNTY PALATINE.

1. Authority of Count to create boroughs, 108, (c)

COURT BARON.

1. Distinction between the court of the free suitors, (Freeholders' Court, or Court Baron,) and the court of the copyholders (customary Court.) 502, n.

COURT ROLL, 424.

I. For what purposes evidence.

See COPYHOLD, 3.

COVENANT, 6, 182, 443.

CRIMINAL INFORMATION.

1. Leave to file a criminal information for a libel should be applied for in a reasonable time, before the expiration of the second term, after the publication of it came to the knowledge of the prosecutor early enough to enable him to move within that period. *Rez v. Jollie and another.* 483
2. The application should be made within a reasonable time against any public officer. 486, n.

DEBTOR.

795

3. In cases of libel the computation is to be made from the time when prosecutor was apprized of the libel, and not from the period of publication. Page 485, n.
4. A rule nisi for a criminal information will not be granted where a former rule for the same matter against the same defendant has been discharged, although the second motion is made upon additional affidavits. *Rez v. Smithson.* 775

CROWN PAPER.

See MANDAMUS, 4.

CUSTOMARY COURT.

See COURT BARON, 1.

DEATH, 101.

And see ABATEMENT, 1, 2.

DEBT, ACTION OF.

See DEBTOR, 1, 2.

DEBTOR AND CREDITOR.

1. Judgment (in debt) deferred because pledge not returned to borrower. 45, n.
2. Action of debt maintainable, notwithstanding loss of pledge, unless otherwise stipulated. 45, n.
3. Loss of pledge to be borne by debtor. 45
4. B., a creditor of A., employs A. to repair a carriage, undertaking to pay ready money for the repairs. B. cannot, upon offering to set off an adequate portion of the debt, require the delivery of the carriage without payment of the repairs. *Clarke v. Fell.* 244
5. And if A. become bankrupt, either before or after the completion of the repairs, his assignees may refuse to deliver up the carriage until payment of the amount of the repairs, it not being, for this purpose, a case of mutual credit.

Ibid.

796 DEFAMATION.

6. A count in assumpsit, stating a promise to pay a sum of money to the plaintiff, without alleging to whom the promise was made, is insufficient. *Price v. Easton*.

Page 303

7. Unless the statement of the promise is preceded by the statement of an agreement between the parties. *Nurse v. Wills*. 765
8. An arrangement between A. and B., who is indebted to C., that A. shall take upon himself B.'s debt to C. is not binding, and gives no cause of action to C. against B., unless C. be a party to the arrangement. *Ibid*.

II. *Marshalling Payments*.

9. Payment of money by debtor to creditor on account generally, will *prima facie* operate in discharge of the earlier part of the account. *Wilson v. Hirst*. 738
10. But such mode of payment is not conclusive; and evidence may be adduced to exclude the application of the rule. *Ibid*.

DEED.

I. *Execution of*.

And see APPRENTICE, 1.

1. A deed is well executed by an illiterate man, if it be signed by a third person at his request and in his presence. *Rex v. Inhabitants of Longnor*. 576
2. It is not necessary that the deed should have been previously read over to him, unless he required it. *Ibid*.

II. *Deposit of Deeds*.

See ATTORNEY, 6, 7.

DEFAMATION.

1. On motion in arrest of judgment the words "you robbed White," held to be sufficient to sustain the verdict without a colloquium, showing the sense in

DEVISE.

which the word "robbed" was used. *Tomlinson, Gent. one &c. v. Brittlebank*. Page 455

DEMURRER, 485.

DEPOSIT.

I. *Of Deeds*.

See ATTORNEY, 6, 7.

II. *Of Money*.

See SHIP, 1.

DESTRUCTION OF PAWN BY FIRE, 35.

See PAWNBROKER, 4.

DETINUE.

I. *Declaration in*.

See AMENDMENT, 1.

II. *Process of Execution in*.

1. By *distringas ad deliberandum*. 267, n.

DEVISE.

See COPYHOLD, IV.—WILL, I. II.

I. *Devisable Interest, 167.*

1. Right of action, not devisable. 85, 170, n.
2. Whether right of entry devisable. *Qu.* 85, 170, n.
3. Possibility coupled with an interest, why devisable. 171, n.

II. *Devised Estate, when vested*.

4. Estate vests in devisee before entry. 167, n.

III. *Quantity of Estate devised*.

5. A. devises to B. and his heirs, "But to permit my daughter, C., not only to receive the rents and profits to her own use, or to sell or mortgage any part thereof, but also to settle on any husband she may take, subject to his being liable to impeachment for waste or non-residence, or neglecting necessary repairs; but should my daughter have a child, I devise it to the use

DISCONTINUANCE.

of such child from and after my daughter's decease, with maintainance in the meantime," with remainders over "should none of these cases happen;" adding, that he did not wish to restrain his daughter as a tenant for life, but that in case of misconduct amongst the remainder-men, she might in a certain mode set aside such remainder-men by her will:—Held, that C. took an estate tail. *Doe d. Jones v. Davies.* Page 654

DILAPIDATION, 415.

And see CASE, 2.

DISAGREEMENT TO AN ESTATE, 173, n., 174, n.

DISCLAIMER.

See 173, n., 228.

I. *Of Authority.*

See TENDER.

II. *Of Tenancy.*

See 174, n.

DISCONTINUANCE.

I. *Of Estate Tail.*

1. Nature of discontinuance. 143
2. Tortious character of estate acquired thereby. 143, n.
3. Possession necessary to creation thereof. 144, n.
4. Cannot be by grant. 145, n.
5. Livery necessary thereto. 148, n.
6. Defined. 149, n.
7. Estate tail discontinued by lease for life made by tenant in tail and reversioner in fee. 155, n.
8. Lands stand limited to A. for 500 years, remainder to B. in tail, remainder to C. in tail, reversion to B. in fee. B. levies a fine with proclamations to the use of himself in fee:—Held, that although the estate for years of A. continues, the estate of B. is discontinued [*quære* barred], and the remainder in tail to C. divested.

DISTRESS. 797

Doe d. Cooper v. Finch and others.
Page 130 *

9. B. dies without issue, having, after the fine, devised to J. S. for the life of C., remainder to D. (the son of C.) for life. C. enters and suffers a recovery, having survived B. five years, and having after the recovery devised to D. (his heir in tail) for life, dies. D. enters.

Conceded that C. was not remitted, and that his recovery was void:

Held, that D. was not remitted.

Semble, that the reversion in fee of B. was devisable, notwithstanding the discontinuance. *Sed quære.*

Ibid.

DISHONOUR OF BILLS OF EXCHANGE, 433.

See BILLS AND NOTES, 3.

DISPATCHES, 335.

See EAST INDIA COMPANY, I.

DISPENSING MEDICINES, 413.

See PHYSICIAN, 1, 2.

DISSEISIN.

1. By entry of devisee of tenant for life. 147, n.
2. Defined. 149, n.

DISTINCT AND SEPARATE BUILDING, 47.

See SETTLEMENT, 14.

DISTRESS.

I. *For Poor-rate.*

1. The application under 41 Geo. 3, c. 23, s. 8, to refund money obtained by a wrongful distress for

* The special case having been turned into a special verdict, a writ of error was brought, which was compromised by the lessor of the defendant in error's paying a small sum to the plaintiff in error, and his costs, in consideration of the extinguishment of the claim.

poor-rates, can be made only at the same sessions at which the rate is reduced and amended. *Rex v. Justices of St. Peter's Liberty, York.* Page 108

2. An action for an unreasonable and excessive distress for poor-rates alleged and pretended to be due, is properly laid in case. *Sturch v. Clarke.* 671
3. In such an action malice need not be proved. *Ibid.*

II. For Rent.

See LANDLORD, IV.

4. After a distress for rent, the tenant, being arrested, goes to gaol, and before the goods are sold, petitions the Insolvent Debtors' Court for his discharge. The landlord is entitled to the whole of the arrears due, and is not restricted to one year's rent. *Wray, assignee, &c. of Calton v. Earl Egremont.* 188

DISTRINGAS.

I. Ad Satisfaciendum.

1. The common law process of execution. 266, n.

II. Ad Deliberandum.

See DETINUE, II.

EAST INDIA COMPANY.

I. In its Political Character.

1. Dispatches, modes of originating. 340—347
2. — power of rescinding. 346—350
3. — whether made with reference to a political object. 348—351
4. — appeal to privy council in respect of. 345, 347
5. — refusal to transmit. 349
6. — refusal of application to suspend issuing of mandamus to give time to appeal. 352
7. Where the Directors of the East India Company transmit to the

EJECTMENT.

Board of Control a dispatch headed "Political Department," and upon alterations being introduced by the Board, discuss those alterations upon the merits, without asserting that the matter of the dispatch is not connected with the civil or military government or the revenues of India, the Directors cannot refuse to transmit such altered dispatch to India, either on the ground that the matter of such dispatch is purely commercial. *Rex v. Court of Directors of the East India Company.* Page 335

8. Or on the ground that the Board of Control may itself originate a dispatch in the form to which the particular dispatch has been altered, and that they have rescinded the resolution upon which the original dispatch was framed. *Ibid.*

II. In its Commercial Character.

See SHIP, 1.

EJECTMENT.

I. Title of Lessor of Plaintiff.

1. A right of re-entry acquired by an omission to repair three months after notice, is suspended, but not waived, by an agreement to allow the tenant further time to repair. *Doe d. Rankin v. Brindley.* 1
2. Nor is it waived by the acceptance of rent accruing due before the expiration of the three months. *Ibid.*
3. Ejectment may be maintained upon a term duly created, but assigned to the lessor of the plaintiff by a deed defective under the statute of 13 Eliz. c. 20. *Doe d. Moore and others v. Ramsden.* 489

II. Defence.

4. It is no defence at nisi prius that in ejectment the declaration was irregularly served;—as where it was served after the term—in a case not within 1 Will. 4, c. 70, s. 26. *Doe d. Rankin v. Brindley.* 1

ESTATE.

5. *A.* having received the profits of land after his marriage, dies, leaving by his wife *B.* a son *C.* *B.* enters and enjoys the land more than fifty years, and by her will, in which she declares that the property had descended to her from her mother, devises it to a son of a second husband. The possession of *B.* is not necessarily adverse to *C.* *Doe d. Roffey v. Harborough.* Page 422

6. Declarations made by the widow, before the time of making her will, that *A.*'s son would have the estate after her death, are admissible as evidence that *A.*'s possession was in his own right; and declarations in the will are inadmissible to shew that the property had descended to the testatrix. *Ibid.*

ELECTION, 286.

See CORPORATION, 5, 6, 7, 8, 9.—

MANDAMUS, 2.—WILL, 2.

1. By select body. 302

EMBEZZLEMENT, 202.

See INDICTMENT, 1, 2.

ENTRY.

See DEVISE, 2.—EJECTMENT, 1, 2.—

FINE, 2.—FORCIBLE ENTRY, 1, 2.

—LANDLORD, 2.

1. Necessary to determine freehold interest. 446, (b)

ERROR.

See SHERIFF, 1, 2.

ESTATE.

1. Disclaimer of tenure. 174, n.
2. Disagreement to an estate. *Ibid.*
3. Distinction between discontinuance of estate tail, and bar of descent to issue in tail. 179, n.
4. Distinction between *divesting* and *discontinuance*. 90, 141, n., 178, n.
3. Possibility coupled with an interest, how to be understood. 171, n.

EVIDENCE. 799

ESTATE TAIL.

I. Creation of.

See DEVISE, 1.

II. Alienation.

See DISCONTINUANCE, *passim*.

1. Alienation by entailee, permitted at common law, post prolem suscitatum. Page 67, 160, n.
2. — prohibited by statute de donis, tempore *Edw.* I. 161, n.
3. — restored by the judges, tempore *Edw.* IV. *Ibid.*

ESTOPPEL.

1. Contingent interest, where bound by matter of estoppel. 171, n.
2. Defendant, where concluded by payment of money into Court. 449

EVIDENCE.

See EXECUTOR, 1.—JUSTICES, 3.

I. Public Documents, Admissibility of.

1. Land-tax assessments are not evidence of seisin where it is shewn to be usual to retain the names of deceased proprietors on the books until the estate is sold to a different family. *Doe d. Stansbury v. Arkwright.* 731

II. Private Writings, Necessity of producing.

2. Indictment against *B.* and *C.* for conspiring to extort money from the prosecutor *A.* by means of a charge of forgery, in which indictment a letter written by *B.* in execution of the conspiracy, and charging *A.* with the forgery of a cheque on *C.*'s bankers, is set out. The letter was given in evidence, and also conversations proved referring to the cheque alleged to have been forged:—Held, that the prosecutor was not bound to produce the cheque, though it appeared that such cheque actually

existed. *Rex v. Ford and Aldridge.*
Page 776

III. Examination of Witnesses.

3. Upon an issue whether plaintiff was interested in goods destroyed by fire, if a witness called by the plaintiff state that invoices of the goods and letters of advice, purporting to be written by him at Edinburgh, were fabricated in London after the fire, by the plaintiff's direction, it is competent to the plaintiff to call other witnesses to disprove the alleged fabrication and shew the genuineness of the documents. *Friedlander v. London Assurance Company.* 30
4. Under an issue upon plene administravit, the executor is not concluded by the amount of assets in the inventory exhibited to the ecclesiastical officer. *Stearn v. Mills and Wright, Executor and Executrix of Wright.* 436

IV. Estoppel.

5. *Semble*, that payment of money into court upon an indebitatus count for work and labour, where there has been but one transaction between the parties, admits the authority of the agent by whom the work was ordered, and that payment of money into court on a count which states a special contract, admits that contract. *Meager v. Smith.* 449
6. But payment generally on the indebitatus counts, does not admit the causes of action, notwithstanding the late Rule of Court directing the particulars to be annexed to the record. *Ibid.*

V. Admissibility of parol Testimony.

7. If one party prove a contract, without its appearing either upon the examination in chief, or upon cross-examination, that the contract was reduced into writing, and the adverse party proves that

EVIDENCE.

the contract was reduced into writing, it is incumbent upon such adverse party to produce or to procure the production of the written instrument. *Rex v. The Inhabitants of Padstow.* Page 9

VI. Admissions, where receivable as Evidence of the facts admitted.

8. A letter written before action brought, but with reference to the subject in dispute, by a person who is afterwards the defendant's attorney on the record, cannot be read as evidence of a fact admitted in such letter without further proof of authority to make such admission. *Wagstaff and another v. Wilson.* 4
9. Acting as churchwarden, prima facie evidence of legal appointment. *Rex v. Mitchell.* 240, n.
10. Admissibility of entries by principal, to charge surety. 204, n.
11. Books of incorporated company made evidence between members of corporation. 216
12. Admissions by the under-sheriff, not accompanying an act done in his official character, held not receivable in evidence to charge the sheriff. *Snowball, qui tam, v. Goodricke.* 234
13. Declarations of bailiff, where admissible against sheriff. 236, n.

VII. Degree of Evidence.

14. Grant (before 1209) "of that pasture which is called Brandwood, to feed their animals," and that the grantees should "have in that pasture 100 cows." By deed of 25 Edw. 3, the owner of the fee granted all his right, and that it should be lawful for the grantees "to inclose the said pasture and to reduce it to cultivation, or to make any other profit thereof."—Held, that the grantees were to be presumed to have been in possession at the time of the second grant, and that it operated as a

EXECUTION OF DEED.

release of the fee. *Doe d. Dearden and others v. Maden, Esq.* Page 533

15. Upon a question of boundary, ancient orders of sessions, containing statements respecting the extent of a district within the jurisdiction of the court of quarter sessions, made when no dispute as to the boundary appears to have existed, were held to be admissible in evidence. *Duke of Newcastle v. Inhabitants of Broxtowe.* 601

16. The mention in Domesday Book of the town of *A.* before the enumeration of the hundreds in the county, in inquisitions taken by jurors of the town of *A.* upon deaths in the castle of *A.*, and a charter erecting the town of *A.* into a county of itself, with a special exception of the castle of *A.*, do not necessarily lead to the conclusion that the castle of *A.* is not within one of the hundreds in the county. *Ibid.*

17. And a judge is authorized to direct a jury to give great weight to evidence of reputation tending to negative such a conclusion. *Ibid.*

18. Declarations made by the widow of *A.* before the time of making her will, that *A.*'s son would have the estate after her death, are admissible as evidence against persons claiming under her that *A.*'s possession was in his own right; and declarations in the will are inadmissible to shew that the property had descended to testatrix. *Doe d. Roffey v. Harbrough.* 422

VIII. Relaxation of Rules of Evidence.

19. It is no ground for departing from the rules of evidence that by adhering to them the revenue may by possibility be injured. *Doe d. Hawthorn v. Mee.* 424

EXCEPTIVE HIRING, 21, 462.

See SETTLEMENT, 7, 8, 9.

EXECUTION OF DEED, 525, 576

See APPRENTICE, 1.—DEED, 1, 2.

EXECUTOR. 801

EXECUTION OF OFFICE, 457.

See SETTLEMENT, IV.

EXECUTION UPON A JUDGMENT.

I. Form of.

1. At common law, by distringas ad satisfaciendum. Page 266, n.
2. By custom, by levary facias. 266, (a)
3. In detinue, by distringas ad deliberandum. 276, n.

II. Operation of.

4. Seizure under a fi. fa. is a taking in execution within 6 Geo. 4, c. 16. 581
5. Fi. fa. de bonis ecclesiasticis, how far a continuing writ. 384
6. Execution, property seized in, when divested. 189, (b)
7. What leviable under levary facias. 267, (b)

EXECUTOR AND ADMINISTRATOR.

And see ACTION, 1.

I. Where chargeable in respect of Assets.

1. Under an issue upon plene administravit, the executor is not concluded by the amount of assets in the inventory exhibited to the ecclesiastical officer. *Stearn v. Mills and another, Executor and Executrix of Wright.* 436
2. Whether such inventory is prima facie evidence of assets, *quere.* *Ibid.*
3. It is not sufficient to charge an executor with assets, to shew that he has acquiesced in the receipt of assets by his co-executor. *Ibid.*

II. Where chargeable personally.

4. The executors of a lessee are chargeable personally as assigns, for such part of the rent as the occupation of the premises is worth. *Rubery v. Stevens and another.* 182
5. But if they do not enter they are

802 FORCIBLE DETAINER.

suable only in the detinet, in respect of any excess of the rent above the value. *Page 436*

EXECUTORY DEVISE, 171, n.

EXTRA-PAROCHIAL, 50.

FELONY.

1. In felony the Court refused to allow the defendant to enter a suggestion for changing the venue, on the ground of a prejudice pervading the county. *Rex, on the prosecution of Daubuz, v. Penpraze. 312**

FEOFFMENT.

I. *Incidents to.*

1. Possession, delivery of, necessary to feoffment. 146, n., 147, n.

II. *Operation of.*

2. Term of years, operation of feoffment upon. 147, n.

FIERI FACIAS DE BONIS ECCLESIASTICIS.

See EXECUTOR, 188.

FINE, 180.

See DISCONTINUANCE, 8.

1. Effect of fine. 130, 143
And see DISCONTINUANCE, 8.
2. Avoided by entry without precise words of avoidance, referring to the fine. 657, (a)
3. Necessity of ouster of adverse claimant. 151, n. (51)
4. Proclamations. 155, n. (57),
156, n. (59), 179, n. (a)
5. Leading principles relating to fine and non-claim. 140, n.

FORCIBLE DETAINER.

1. After lawful entry. 58

See FORCIBLE ENTRY.

* At the Launceston assizes, 1834, the indietee recovered 60*l.* damages against the prosecutor, in an action for malicious prosecution.

FRAUDS.

FORCIBLE ENTRY.

1. A conviction for a forcible detainer under 8 *Hen.* 6, c. 9, must shew an unlawful *entry* as well as a forcible detainer. *Rex v. Robert Oakley and others. Page 58*
2. Whether the holding over by a termor, after the expiration of his term, is constructively an unlawful *entry, quære. Ibid.*

FORFEITURE, 443.

See MINE, 1.

FORGERY.

See EVIDENCE, 2.

FORMEDON.

I. *In the Descender.*

1. Limitation of action in. 386, n.

II. *In the Reverter.*

2. Where it lies. 179, n.*

FRAUD.

See 555, 696, (c).

I. *Effect of.*

1. *Semble*, a licence to sell beer, although obtained by fraud, is valid, unless the fraud be practised by the party to whom the licence is granted. *Rex v. Minshull. 277*

FRAUDS, STATUTE OF.

See AUCTION, 1.

FRAUDULENT CONVEYANCE.

I. *Penalties, by whom recoverable.*

1. The assignees of an insolvent are entitled to sue for penalties as under the 13 *Eliz.* c. 5, s. 3, as the parties grieved by a fraudulent conveyance of the insolvent's property. *Butcher v. Harrison. 677*

II. *To what extent incurred.*

2. The penalty for a *fraudulent*

* Where formedon in the *descender* should be read formedon in the *reverter*.

GOOLE.

conveyance of land, with intent to delay, hinder or defraud creditors, is the annual value only, without regard to the consideration named in the conveyance, which in the case of *covenant bonds* is the measure of the penalties recoverable under this statute. *Page* 677

FRIENDLY SOCIETIES, 252.

See JUSTICES, 3.

GAMING, 191.

See NEW TRIAL, 1.

1. Securities given upon gambling transactions, void in hands of holder for value. 193, (a)

GAMING HOUSE.

See LIBEL, 1.

GARDEN.

See WASTE, 1.

GLEBE LAND, 415.

See CASE, 2.

GOOD WILL, 404, 548.

See STATUTES, 1, 2.

GOOLE.

1. Commission to set out limits of port of Goole. 86
2. Not within the port of Hull. 87
3. Liability of vessels loading at Goole and going within port of Hull, to pay tonnage duties to Hull Dock Company. 95
4. Vessel passing through mouth of port of Goole. 100
5. Vessels taking in the whole or part of their cargo in the port of Goole, and proceeding therewith to Hull, are liable to pay to the Hull Dock Company the tonnage duties of 2*d.* per ton, under 42 *Geo.* 3, c. 91, s. 44. *Hull Dock Company v. Priestly.* 85
6. Vessels proceeding to Hull from a place above Goole, (as Leeds,) and not touching at Goole, but merely passing the entrance into

HUNDRED. 803

the port of Goole, are not liable to tonnage duty. *Page* 85

GRANT.

1. What estates lie simpliciter in grant. 169
2. No discontinuance by grant. *Ibid.*
3. Grant of annuity by directors of corporation. 206

See CORPORATION, 3.

GRIMSBY, 86.

GUARANTEE.

See USURY, 2.

HIGHWAY.

I. Dedication.

1. Dedication of a road to the public, not to be presumed against reversioner. 13

II. Diversion.

See APPEAL, 3.

HULL.

1. Vessels taking in the whole or part of their cargo in the port of Goole, and proceeding therewith to Hull, are liable to pay to the Hull Dock Company the tonnage duties of 2*d.* per ton, under 42 *Geo.* 2, c. 91, s. 44. *Hull Dock Company v. Priestly.* 85
2. Vessels proceeding to Hull from a place above Goole (as Leeds), and not touching at Goole, but merely passing the entrance into the port of Goole, are not liable to tonnage duty. *Ibid.*

HUNDRED.

I. Remedies against.

1. To entitle a party who has sustained damages under 30*l.* by the felonious act of rioters to require under the 7 & 8 *Geo.* 4, c. 31, s. 8, the holding of a petty sessions for hearing and determining his claim for compensation, it must appear that within seven days after the

804 INSOLVENT DEBTOR.

commission of the offence he went before a justice of the peace, and that he has complied with all the other requisites of the third section. *Rex v. Bateman and Hart, Justices of Folkestone.* Page 718

2. In the absence of an affidavit verifying these facts (even in general terms) the Court will not grant a mandamus for the holding of a petty sessions for such purpose. *Ibid.*

IMPRISONMENT.

See JUSTICES, 6, 7.

INCOMPATIBLE OFFICE.

See CORPORATION, IV.

INDICTMENT.

1. An indictment for a conspiracy to embezzle the goods of a bankrupt must state the trading, the petitioning creditor's debt, and the becoming bankrupt. *Rex v. Evan Owen Jones and others.* 78
2. It is not sufficient to state that a commission issued, under which the party was *duly found and declared* to be a bankrupt. *Ibid.*

INFERIOR COURT.

1. *A.* employs *B.* and *C.*, who are attorneys and partners, to prosecute an action in the Palace Court; *B.* alone being an attorney of that Court. The amount of *B.* and *C.*'s bill of costs is recoverable from *A.* in a joint action by *B.* and *C.* *Arden and another v. Tucker.* 759

INFORMATION, 286.

See QUO WARRANTO.—CRIMINAL INFORMATION.

INSOLVENT DEBTOR.

1. *A.*, an attorney employed by *B.*, an insolvent, to prepare the schedule, omits, with her privity, to insert his own debt: *Semble*, that this is not such a fraud as will destroy *A.*'s right of action against

INTERESSE TERMINI.

B. for nonpayment of such debt.* *Howard v. Bartolozzi.* Page 69

2. After distress by landlord, the tenant, being arrested, goes to gaol and petitions the Insolvent Debtors' Court before the goods are sold. The landlord is entitled to the whole of the rent due, and is not restricted to one year's rent. *Wray, Assignee &c. of Calton v. Earl of Egremont.* 188
3. The assignees of an insolvent are entitled to sue for penalties under the 13 Eliz. c. 5, s. 3, as the parties grieved by a fraudulent conveyance of the insolvent's property. *Butcher v. Harrison.* 677
4. Under 7 Geo. 4, c. 57, s. 19, it is competent to the Insolvent Debtors' Court, with the consent of the Lords of the Admiralty, to order the payment to the assignee of a portion of a pension charged on the navy estimates, and granted to the insolvent by the crown upon his being superseded in the office of advocate to the Court of Admiralty, in consideration of ill health and the length of time that he had been in the office. *In re Battine.* 579

INSURANCE.

I. Duration of Risk.

1. Upon an insurance "at and from Liverpool to Monte-Video and Buenos-Ayres, if open, or her final port of discharge in the River Plate, with liberty to wait two months at Monte-Video if needful," the risk determines when the vessel has staid two months at Monte-Video. *Doyle v. Powell.* 678

II. Fire Insurance.

See EVIDENCE, 3.

INTERESSE TERMINI.

1. When converted into an actual term. 28, 162, n.

* Held contra afterwards in the Exchequer, E. T. 1833.

JUSTICES.

INTEREST.

See LIMITATION, 1.

INVENTORY, 436.

See EXECUTOR, 1.

IRREGULARITY.

1. Motion to set aside judgment confessed upon an illegal consideration said to be in the nature of an application on the ground of irregularity. *Page 384*

JUDGMENT.

And see IRREGULARITY.

1. Judgment by default or confession, where void under 6 *Geo. 4*, c. 16, s. 108. *662*
2. Judgment, where protected under 1 *Will. 4*, c. 7, s. 7. *Ibid.*

JURISDICTION, 252.

See ATTORNEY, 2.—JUSTICES, I.

JUSTICES OF THE PEACE.

I. *Extent of Jurisdiction.*

And see HUNDRED, 1, 2.—ORDER OF REMOVAL, 1.—OVERSEERS, 1.—PAWNBROKERS, I.

1. Under 17 *Geo. 2*, c. 38, magistrates have a discretionary power as to committing an overseer for not accounting. *Rex v. Justices of Norfolk.* *67*
2. The authority of justices under 10 *Geo. 4*, c. 6, to inquire whether the tables of payments and benefits in friendly societies can safely be adopted, does not extend to societies instituted *before* the passing of that act. *Rex v. Justices of Somerset.* *252*
3. A magistrate cannot be required to hear evidence which ought not to affect his determination. *Rex v. Minshull.* *277*
4. *Semble*, a licence to sell beer, although obtained by fraud, is valid, unless the fraud be practised by the party to whom the licence is granted. *Ibid.*

LAND TAX. 805

II. *Authority, how exercised.*

5. Where power is given to a magistrate to commit by issuing forth his warrant, as under 5 *Geo. 4*, c. 18, s. 2, such warrant must be in writing. *Hutchinson v. Lowndes.* *Page 674*
6. And an imprisonment without a warrant in writing, except during the period necessary to prepare the warrant, is illegal. *Ibid.*
7. This irregularity is not cured by a warrant of commitment drawn upon a subsequent day, dated as of the day of the commitment. *Ibid.*

III. *Proceedings of Sessions.*

8. Where upon a special case facts are stated which warrant the judgment of the Court below, but that Court has drawn an inference which that statement does not justify, the order will be confirmed without sending the case back to be restated. *Rex v. Inhabitants of Rickinghall Superior.* *47*

IV. *Notice of proceeding against a Magistrate.*

9. A notice to a magistrate of intention to move for a rule nisi for a certiorari on the day on which the notice is served, "or as soon afterwards as I can be heard," will not be taken to be a notice of intention to move as soon as by law the party might be heard, *i. e.* in six days after notice. *Rex v. Flounders, Esq., and others, Justices &c.* *592*

JUSTICES, 267, 269.

KING'S BENCH PRISON, 128.

See ATTORNEY, 17.

LANCASTER.

1. Practice of the county court there. *268*

LAND TAX ASSESSMENTS.

See EVIDENCE, 1.

LANDLORD, 1.

*See EJECTMENT, 1, 2.*I. *Remedy against Strangers.*

1. Action by landlord in name of tenant. Page 14

II. *Remedy against Tenant.*

2. Constructive entry of tenant by holding over. 65

III. *Repair.*

3. Enlarging windows, opening external doors, and taking down partitions, no breach of covenant to repair and keep in repair a dwelling-house, together with all buildings, improvements or additions erected, set up, or made by the lessee. *Doe d. Dalton v. Jones and another.* 6
4. A right of entry acquired by an omission to repair three months after notice, is suspended, but not waived, by an agreement to allow the tenant further time to repair. *Doe d. Rankin v. Brindley.* 1
5. Nor is it waived by the acceptance of rent accruing due before the expiration of three months. *Ibid.*

IV. *Rent.*

6. *A.* distrains the goods of *B.* his tenant. After the distress *B.* goes to gaol, and petitions the Insolvent Debtors' Court before the goods are sold. *A.* is entitled to the whole of the arrear due, and is not restricted to one year's rent. *Wray, assignee of Calton, an insolvent debtor, v. Earl of Egremont.* 188
7. Tender of rent and expenses need not be made to the broker who distrains: if made to the landlord, a subsequent detainer is wrongful. *Smith v. Goodwin and another.* 371

V. *Good-will.*

8. A person whose legal tenancy had been determined by notice to

quit, was held to be entitled to compensation for good-will under the Hungerford Market Act. *1 Rex v. Hungerford Market Company, in the matter of John Still.*

Page 440

9. A tenant whose term has expired was held to be entitled to compensation for good-will, and for the chance of obtaining a renewal, under the Hungerford Market Act. *1 Rex v. Hungerford Market Company, in the matter of John Gosling.* 548

VI. *Interesse Termini.*

10. Interesse termini, when converted into an estate for years. 28, 162, n.

LATENT AMBIGUITY, 512.

See WILL, 1, 2, 3.

LEASE, 443.

See LICENCE, 1.

LEEDS.

1. Non liability of vessels coming from Leeds to pay tonnage duties to the Hull Dock Company. 96

LEVARI FACIAS.

1. Issuable by custom in lieu of distringas ad satisfaciendum. 266, n. (a)
2. What leviable under. 267, n. (b)

LIBEL.

I. *What shall amount to.*

1. A writing in which a party is spoken of in language usually applied to the keeper of a gaming-house is libellous, whether the words are capable of being applied by an innuendo to specific charges of unfair practices or not. *Digby v. Thompson.* 485
2. In an action for a libel, a plea justifying a charge of having disclosed confidential communication

LIMITATION.

made to the plaintiff as an attorney may be supported by proof of the disclosure of communications made to him by his clients which are not of that strictly privileged character which would prevent his examination as a witness. *Moore, Gent. one, &c. v. Terrell. Page 559*

II. *How prosecuted.*

See CRIMINAL INFORMATION.

LICENCE.

I. *By way of passing an Interest.*

1. *A. grants to B. a licence to enter upon his lands to search and dig for ores for a term of twenty-one years, with a proviso that if B. ceases to work the mines for six months, or breaks any other of the covenants contained in the licence, then the indenture and the liberties, licences, powers and authorities thereby granted, shall cease, determine, and be utterly void and of no effect. The word "void" is to be construed as "voidable." Roberts v. Davey. 443*
2. And some act on the part of *A.* indicating an election by him is necessary to avoid the licence. *Ibid.*

LICENCE TO SELL BEER, 277.

See JUSTICES, 4.

LIEN, 229.

See VENDOR, 1, 2, 3.

LIMITATION.

I. *Of Actions.*

1. Held, that a stale debt bearing interest is not taken out of the statute of limitations by an engagement signed by the debtor to charge his estate with a sum corresponding in amount with the debt, with interest from the date of the engagement. *Martin v. Knowles. 421*

MANGANESE. 807

II. *Of Estates.*

See *Doe d. Cooper v. Finch, 153.*

LIVERY OF SEISIN.

1. Presumption of. *Page 540, n. (a)*

LOAN OF MONEY.

See DEBTOR, 1, 2, 3.—USURY, 1, 2.

MALICE.

See DISTRESS, 3.

MALICIOUS PROSECUTION, 321, 802, n.

See ACTION, 7.

MANDAMUS.

See CORPORATION, 1.—EAST INDIA COMPANY, 6.—STATUTE, 4.

I. *Where it lies.*

1. A magistrates' clerk has no permanent interest in his office; and if he be dismissed without cause, no mandamus lies to restore him. *Ex parte Charles Sandys. 591*
2. It is no ground for refusing a mandamus to admit a party to an office, to which he has been elected, that to a similar mandamus, granted in respect of a former election of the same party, a return was made shewing an excuse valid in point of law for not admitting him. *Rex v. Mayor and Aldermen of London. 287*

II. *Quashing.*

3. In shewing cause against a rule for quashing a return, the defendant may object that the mandamus was improperly issued. *Rex v. St. Katharine's Dock Company. 121*
4. A rule for quashing a return to a mandamus need not go into the crown paper. *Ibid.*

MANGANESE, 194.

See POOR-RATE, 1, 3, 4.

MANUFACTURERS.

See CASE, ACTION ON THE, 6, 7.

MARKET.

I. *Rights incident to.*

1. A right by custom to exclude persons from selling marketable articles in their shops on market days, without the limits of a market, is valid in law. *Mayor of Macclesfield v. Pedley.* Page 708
2. Such a right is not incidental to the grant of a market, *semble.* *Ibid.*

MARRIAGE.

And see BARON AND FEME.

I. *When valid.*

1. A marriage by banns, published in false names, is not void under 4 Geo. 4, c. 76, s. 22, unless both parties were privy to such mispublication. *Res v. Inhabitants of Wroton.* 712

MEMORANDA, 228, 400.

MILITIA.

1. Settlement of persons serving in. 200

MINE, 194.

And see POOR-RATE, 1, 3, 4.

I. *Licence to Work.*

1. *A.* grants to *B.* a licence to enter upon his lands to search and dig for ores, for a term of twenty-one years, with a proviso that if *B.* ceases to work the mines for six months, or breaks any other of the covenants contained in the licence, then the indenture and the liberties, licences, powers and authorities thereby granted shall cease, determine and be utterly void and of no effect:—Held, that the word “void” is to be construed to mean voidable, and that some act of *A.* to shew his election to enforce the forfeiture, is necessary

NEW TRIAL.

to put an end to the licence. *Roberts v. Davey.* Page 443

MISDEMEANOR, 275.

See BILL AND NOTE, 2.

MISDIRECTION.

1. To entitle a party to a new trial on the ground of misdirection, it must be shewn that the jury has been thereby induced to form a wrong conclusion. *Duke of Newcastle v. Inhabitants of Hundred of Brortowe.* 601

MISJOINDER OF COUNTS,
132.

See ACTION, III.

MISJOINDER OF PARTIES.

See BARON AND FEME, I.

MISTAKE, 263.

See ATTORNEY, 4.

MONEY CONSIDERATION, 33.

See SETTLEMENT, 14.

MORTGAGE, 237.

See TURNPIKE, II.

1. Practice with respect to preparing mortgage securities. 563, n. (a)

NEW TRIAL.

I. *When granted.*

1. In an action on a bill of exchange, after a verdict for the defendant on the ground that the bill was drawn originally for a gambling debt, the Court will not grant a new trial upon affidavits negating such defence, where there has been no surprise upon the plaintiff. *Aiken v. Howell.* 191

II. *Costs of Motion.*

2. The rule as to the payment of costs, on a motion for a new trial,

OCCUPIER.

is the same in principle in criminal and civil cases. *Rex v. Ford and Aldridge.* Page 776

NON-RESIDENCE.

I. Penalties, when incurred.

1. Whether a clergyman is wilfully absent from his benefice during the time he is in custody for debt under an arrest made whilst he is residing out of his parish, *quære.* *Vaux v. Vollans.* 307

II. Notice of Action.

2. The notice in writing required by 57 Geo. 3, c. 99, s. 40, to be given to the bishop previously to the commencement of an action against a clergyman of the diocese for penalties for non-residence, is not properly served by leaving it in the hands of the registrar of the diocese; such notice must be left at the registry office. *Ibid.*
3. The notice need not be served by the attorney by whom it is issued. *Ibid.*

NOTICE OF ACTION.

See NON-RESIDENCE, II.

NOTICE OF APPEAL, 331, 369, 426.

See APPEAL, I.

NOTICE OF BINDING AN APPRENTICE.

See SETTLEMENT, 5.

NOTICE OF INTENTION TO PURCHASE.

1. Where not revocable. 112

OCCUPATION OF SEVERAL TENEMENTS, 466.

See SETTLEMENT, 10, 11, 12, 13.

OCCUPIER, 194.

See POOR-RATE, 3, 4, 5.

PARISH.

809

OFFICER.

And see QUO WARRANTO, I.

1. In actions against overseers and constables, no demand of perusal and copy of warrant is necessary, if no action would have lain against the party issuing the warrant. *Sturch v. Clarke.* Page 671
2. As to magistrates' clerk, *see* MANDAMUS. 255

OPTION TO PURCHASE LAND BY PUBLIC COMPANY, 112.

See STATUTE, 6.

ORDER OF REMOVAL.

1. An order of removal made from the parish of *A.* to the parish of *B.* (in which are two townships, *C.* and *D.* each having separate overseers and maintaining its own poor,) is served upon the overseers of *C.*, to whom the paupers are delivered. An appeal against the order is entered, and respited as the appeal of the churchwardens and overseers of *B.* A notice of trial for the subsequent sessions, given in the name of the overseers of the township of *C.*, as appellants, against an order made upon the overseers of the township of *C.*, in the parish of *B.*, is sufficient. *Rex v. Justices of Caermarthen.* 369

OVERSEER.

And see OFFICER, 1.

1. An overseer is bound to deliver in an account of the sums due from the rate-payers, although he may no otherwise have acted than by signing the rate. *Rex v. Justices of Norfolk.* 67

PALACE COURT.

See INFERIOR COURT.

PARISH APPRENTICE, 14.

See SETTLEMENT, 3, 4, 5, 6.

PARTICULARS OF DEMAND.

See PRACTICE, 6.

PARTNER.

1. A partnership, general in point of duration, may be dissolved at any time, (as to future transactions.) *Heath v. Sansom and Evans.* Page 104
2. And such dissolution need not be published or communicated, to exempt a retiring dormant partner from liability in respect of subsequent engagements. *Ibid.*
3. In an action by *A.* a banker, against *B.* a customer, for the balance of his account, *C.* a former partner with *B.*, upon whose secession from the partnership *B.* and *C.* executed mutual releases of all demands, is a competent witness to disprove an item charged by *A.* in the account, although the accounts between *B.* and *C.* are still unsettled, and although, since the dissolution of the partnership, *B.* as continuing partner has asked his creditors for time. *Wilson v. Hirst.* 742
4. *A.*, after the bankruptcy of his partner *B.*, believing the firm to be solvent, pays in partnership money to *C.* their banker, to meet their current engagements, and the money is so applied. *A.* afterwards becomes bankrupt. This payment is valid, and *C.* is not liable for the amount to the assignees of *B.* and of *A.* *Woodbridge v. Swann.* 724
5. Afterwards *A.* whilst solvent, and the assignees of *B.*, opened a new account with *C.*, and paid in money to discharge an old debt, which money was so applied. The assignees of *B.* and of *A.* cannot recover the amount from *C.* *Ibid.*

PAUPER.

And see POOR-RATE—SETTLEMENT.

I. Where removable.

1. The owner and occupier of ratable property in *A.*, without the

PHYSICIAN.

privity of the parish officers, sends a pregnant woman from *A.* to *B.* for the purpose of preventing her illegitimate offspring from becoming chargeable to *A.* The child born in *B.*, and becoming chargeable in *C.*, is not removable from *C.* to *A.* *Rex v. Inhabitants of Mathersey.* Page 44

2. It makes no difference that *B.* is extra-parochial. *Ibid.*
3. *Semble*, that if she had been so sent by the parish officers of *A.*, the child born in *B.* would not have been legally settled in *A.*, unless the mother's settlement had been in *A.* at the time of the fraudulent removal to *B.* *Ibid.*

PAWNBROKER.

I. Statutory control over.

1. The power of imprisonment given by the 14th section of 39 & 40 Geo. 3, c. 99, (the Pawnbrokers' Act,) in cases of wilful detention, does not extend to the cases of embezzlement, loss, or damage, provided for by the 24th section. *Rex v. Cording.* 35
2. Offences against 24th section, not punishable by imprisonment. 41
3. Distinction between 14th and 24th sections. 46
4. *Semble*, that a pawnbroker is not liable to make compensation where the pledge has been destroyed by fire, without his negligence or default. *Ibid.*
5. Distinction between loss of pawn by negligence and by accident. 45

PAYMENT OF MONEY INTO COURT, 117, 449.

See PRACTICE, II.

PENSION.

See INSOLVENT, 4.

PHYSICIAN.

I. Statutory control over Medical Practitioners.

1. A physician with a diploma

POOR RATE.

- from a Scotch university, cannot, as such, dispense medicines in England, without complying with the terms of the Apothecaries' Act, (55 Geo. 3, c. 194.) *Apothecaries' Company v. Collins, M.D.* Page 401
2. An unqualified person dispensing of his own advice, is within the penalties of the Apothecaries' Act, 55 Geo. 3, c. 194. *Apothecaries' Company v. Allan.* 413

PINDER, 118.

See SETTLEMENT, 16, 17.

PLEA, 559.

See LIBEL, 2.

PLEADING.

See BANKRUPT, 6, 7, 8.

I. Declaration.

See BOND, 1.

1. A count charging the defendant with having preferred a charge of felony against the plaintiff before a magistrate, and having, under a warrant to search the plaintiff's house for stolen goods, obtained upon such charge, entered the plaintiff's house, may be joined with counts in tort. *Hensworth v. Fowkes.* 321
2. An allegation that the defendant entered the house to search for the said goods, is a sufficient allegation that he entered under the warrant. Per *Taunton and Patteson, JJ.*; dissentiente, *Littledale, J.* *Ibid.*

POOR-RATE.

I. In respect of what Property.

1. Ratability of mines. 198

II. Property, how assessed.

2. In rating to the poor, land liable to sewers-rate, the amount of such rate must be deducted from the valuation. *Res v. Adames.* 662

PRACTICE. 811

3. The owner of the soil granting a lease or set of a manganese mine, reserving a money render per ton of mineral raised, is not liable to be rated to the relief of the poor as an occupier. *Res v. Tremayne.* Page 194
4. Nor is the occupier of a manganese mine liable to be rated. *Ibid.*
5. Lessee of tolls is not ratable to the poor in respect of such tolls, although he occupy a toll-house under the same demise. *Res v. Snowden.* 459

III. Excessive Distress.

6. An action for an unreasonable and excessive distress for poor rates, alleged and pretended to be due, is properly laid in case. *Sturch v. Clarke.* 671
7. In such an action, malice need not be proved. *Ibid.*

IV. Restitution after wrongful Distress.

8. The application, under 41 Geo. 3, c. 23, s. 8, to refund money obtained by a wrongful distress for poor rates, can be made only at the same sessions at which the rate is reduced and amended. *Res v. Justices of St. Peter's Liberty, York.* 108

POSSE COMITATUS, 61.

POSSESSION.

1. Possession by particular tenant. 168, n.
2. Ouster of tenant for years. 180, n. (92)

POSSIBILITY COUPLED WITH AN INTEREST.

1. Nature of. 170, 171

PRACTICE, 483.

See CRIMINAL INFORMATION, 1, 2, 3, 4.

I. *Notice of Action.*

1. The notice in writing required by 57 Geo. 3, c. 99, s. 40, to be given to the bishop previously to the commencement of an action against a clergyman of the diocese, for penalties for non-residence, is not properly served by leaving it in the hands of the registrar, or deputy registrar, of the diocese. *Vaux v. Vollans.* Page 407
2. Such notice must be left at the registry office. *Ibid.*
3. The notice need not be served by the attorney by whom it is issued. *Ibid.*

II. *Payment of Money into Court.*

4. *Seemle*, that payment of money into Court upon an indebitatus count for work and labour, where there has been but one transaction between the parties, admits the authority of the agent by whom the work was ordered. *Meager v. Smith.* 449
5. Payment of money into Court on a count which states a special contract, admits that contract. *Ibid.*
6. But payment generally on the indebitatus counts, does not admit the causes of action, notwithstanding the late rule of Court which directs the particulars to be annexed to the record. *Ibid.*

III. *Motion to set aside Judgment.*

7. Motion to set aside judgment confessed upon an illegal consideration, said to be in the nature of an application to set aside proceedings on the ground of irregularity. 384

IV. *Execution.*

8. The allowance of a writ of error is sufficient to render the sheriff executing a writ of fi. fa. after notice of such allowance, liable in an action of trespass without any writ of supersedeas being issued; and notice to the sheriff is notice

PUTURE.

- to the officers executing the process. *Belshaw v. Marshall.* 689
9. There does not appear to be any precedent for issuing process of supersedeas upon the allowance of a writ of error. Page 689
 10. Fi. fa. de bonis ecclesiasticis, how far a *continuing writ.* *Ibid.*

V. *Special Case.*

11. Conversion of special case into special verdict. 181, n. 93

PRESUMPTION OF POSSESSION, 533.

See EVIDENCE, V. 13.

PRINCIPAL AND AGENT, 434.

See ACTION, 1, 5.—PRACTICE, 4.

PRISONER.

I. *Upon Civil Process.*

1. Attorneys are entitled to be admitted to the interior of the King's Bench prison when they have occasion to go there for the benefit of clients confined in the prison, or when they are sent for by such clients. *In re William Jones, Esq. Marshal of the King's Bench Prison.* 128
2. But the Court will not make a *general* order upon the marshal to permit an attorney to go into the interior at all times to visit his clients. *Ibid.*

PRIVITY OF CONTRACT.

See ACTION, 6.—SHIP, 1.

PRIVY COUNCIL.

See EAST INDIA COMPANY, I.

PROMISSORY NOTE.

See BILLS AND NOTES.

PUTURE.

1. This term explained. 535, n. (b)

QUO WARRANTO.

QUO WARRANTO INFORMATION.

I. *Where grantable.*

1. A statute directs the payment of county rates to a person to be appointed by the justices county treasurer, he first giving sufficient security to the justices to be accountable to them for the money which he shall so receive. The giving of the security is not a condition precedent to the vesting of the office of treasurer in the person so appointed,

Or to his liability to account. *Rex v. Patteson.* Page 612

2. An office, of which the salary is to be fixed and the accounts audited by certain justices, cannot be held by one of such justices. *Ibid.*
3. An alderman elected by the whole corporate body does not vacate his office by the acceptance of an incompatible office conferred upon him by a select body. *Ibid.*
4. Such second appointment is void. *Semble.* *Ibid.*

5. A public officer cannot vacate his office by accepting an incompatible office,

Unless the first be an office which he might have determined by his own act. *Ibid.*

6. Or an office which he might have surrendered to the party appointing to the second office. *Ibid.*

7. Or an office from which he might have been removed by, or with the concurrence of, the party appointing to such second office. *Ibid.*

8. On a rule nisi for an information in the nature of a quo warranto, the relator is bound by the day on which by his affidavit (though founded on information and belief) the election is alleged to have taken place, and if the day is mistaken, the defendant is not bound to shew a regular election on another day. *Rex v. Rolfe.* 773

REMAINDER. 813

RAILWAY.

See STATUTES, 3, 5.

RATE.

See POOR-RATE.

READY MONEY.

See SET-OFF, 1.

RECOVERY.

See DISCONTINUANCE, 9.

RE-ENTRY.

See EJECTMENT, 174.

REFUNDING MONEY OBTAINED BY WRONGFUL DISTRESS.

See DISTRESS, 1.

REGISTRAR OF DIOCESE.

See PRACTICE, 1.

REGULÆ GENERALES, 219, 400.

RELATION.

1. Subsequent assent to a trespass will not make the assenting party a co-trespasser, unless the trespass were committed for his benefit. *Wilson v. Barker and Mitchell.*

Page 409

RELEASE, 533.

I. *Release pur enlarger l'Estate.*

1. To a bargainee in possession under the Statute of Uses. 175, n.
2. To grantee of an easement. 533

II. *Release of Actions and Demands.*

3. As to the effect of mutual releases between partners, *see* PARTNERS, II.

REMAINDER.

1. Defined. 150, n. (49)
2. Lies in grant. 169, n. (81)
3. How destroyed. 130, 178 n. (90)

814 RESTITUTION.

REMITTER.

And see 130, 142, 158, n. (60), 162, n.

I. *Who remitted.*

1. Party taking defeasible estate of freehold by descent from cestui que use.
2. Upon lease and release. *Page* 175, n.
3. By descent of the right upon party who has previously taken a defeasible estate of freehold. *Ibid.*
4. Devisee. 176, n.

II. *Who not remitted.*

5. Under Statute of Uses. 172, n.

REMOVAL OF PARTITIONS.

See WASTE, 2.

REMOVAL OF PREGNANT WOMEN.

See PAUPER, 1, 2, 3.

RENT.

See EJECTMENT, 2.—EXECUTORS, 4, 5.
—LANDLORD, IV.—TENDER, 1, 2.

1. Renter of part of the thing demised in the name of rent. 198

REPAIRS.

See EJECTMENT, 1.

REPLEVIN.

1. Course of proceedings in. 364
2. Whether taking a replevin bond is a proceeding in the suit. 366

RESPITE.

See APPEAL, 1, 2.

RE-STATEMENT OF SPECIAL CASE, 48.

See DISTRESS, 1.

RESTITUTION AFTER DISTRESS.

See DISTRESS, 1.

SERVICE.

REVERSION.

See CASE, 3, 4, 5.—DISCONTINUANCE, 7, 9.

1. Estate of reversioner preserved by possession of particular tenant. *Page* 151, n. (51)
2. Ouster of particular tenant, essential to disseisin of reversioner. 152, n.
3. Not the subject of actual ouster. *Ibid.*

RIOT.

I. *Remedy of Parties injured.*

1. Held that the owner of a house feloniously demolished by rioters, is entitled to such a sum as compensation, under 7 & 8 Geo. 4, c. 31, as will enable him to repair the injury and reinstate the premises. *Duke of Newcastle v. Hundred of Broxtowe.*
2. Although the property be of little or no value. *Ibid.*

RULE IN SHELLEY'S CASE.

1. Operation of rule upon consecutive limitations. 657, n. (g), 661, n. (b)
2. Upon limitations not consecutive. *Ibid.*
3. Limitations affected by rule, how described in pleading. 658, n.

SCIRE FACIAS.

See ACTION, 4.

SCOTCH DIPLOMA, 401.

See PHYSICIAN, 1.

SEAL.

1. Affixing seal of corporation. 207

SEARCH WARRANT.

See PLEADING, 1.

SERVANT.

See CORPORATION, 2.

SERVICE OF DECLARATION, 1.

SETTLEMENT.

SERVICE OF NOTICE, 307.

SET-OFF.

I. Where allowed.

1. Pleadable against contract to pay in ready money. *Page 244, (a)*
2. In an action by a trustee to recover a debt for the cestui que trust, a debt due from the cestui que trust cannot be set off. *William Tucker, Executor, &c. v. Emeline Tucker, Executrix, &c. 477*

SETTLEMENT.

And see MILITIA.

1. Certainty as to place of settlement desirable. 18

I. By Apprenticeship.

2. The 24th section of 24 Geo. 3, c. 54, operates to prevent a person from gaining a settlement by apprenticeship in a parish in which the master, at the time of the binding, resided under a certificate, although the master's disability is subsequently removed, and there is a sufficient service and residence afterwards in the parish. *Rex v. Inhabitants of Leeds. 650*
3. A special authority delegated by a local act to the directors and guardians of paupers of a district incorporated for the government of the poor, to bind out apprentices, must be executed by an indenture, to which the seals of the apprenticing directors and guardians are affixed. *Rex v. Inhabitants of Haughley. 525*
4. The affixing of the corporation seal is insufficient. *Ibid.*
5. Where a child is bound apprentice by the parish of A. to a master, resident in the parish of B., notice of the intended binding must, under 56 Geo. 3, c. 139, be given to the overseers of B., though A. and B. are in the same county. *Rex v. Inhabitants of Threlkeld. 14*
6. Allowance of indenture by justices of the same trade. 29

SETTLEMENT. 815

II. By Hiring and Service.

7. A. contracted to become the hired servant of B. for five years, to do such work "as belongeth to the finishing of cloth, and to take any part of work B. should think proper, and B. promised to pay unto A. 10s. per week for the first two years, 11s. for the third, 12s. for the fourth, and 13s. for the fifth year; the hours of working to be from six o'clock in the morning until seven o'clock in the evening, and to be paid for all over time, and deducted for all short, either in sickness or in health." This is not an exceptive hiring; and service under this contract confers a settlement. *Rex v. Inhabitants of Osett-cum-Gawthorpe. Page 21*
8. A contract imposing upon the servant a fine if he absent himself without having performed a reasonable day's work, does not constitute an exceptive hiring, and a settlement is gained by service under it. *Rex v. Inhabitants of St. Helen's, Auckland. 462*
9. Character of exceptive hiring. 24

III. By renting a Tenement.

10. A settlement may under 6 Geo. 4, c. 57, be gained by renting and occupying a tenement which consists partly of a dwelling-house and partly of a building hired at different times under different landlords. *Rex v. Inhabitants of Tadcaster. 466*
11. From 1815 to 1830 A. occupied at the rent of 6l. three rooms, part of a dwelling-house in the parish of B., of the value of 16l. per annum, divided into five sets of apartments, with separate entrances, under an agreement by which A. was to pay, and did pay, the taxes &c. for the whole dwelling-house, deducting the amount from his rent: Held, that A. gained a set-

tlement in *B. Rex v. Inhabitants of Penryn.* Page 74

12. Land rented and occupied from Lady Day to Lady Day, and a cottage rented and occupied from May Day to May Day, under a joint demise at 10*l.*, confer a settlement under 6 *Geo.* 4, c. 57, s. 2. *Rex v. Inhabitants of Ormesby.* 27

IV. By purchasing an Estate.

13. A shop held jointly with an adjoining house, with which it has an internal communication, is not to be considered as a *distinct and separate building.* *Rex v. Inhabitants of Rickingham Superior.* 47
14. The restriction upon the acquiring of a settlement by purchase, in 9 *Geo.* 1, c. 7, s. 5, requiring a consideration of 30*l.* is limited to purchases for a *money* consideration. *Rex v. Inhabitants of Lydlinch.* 33

V. By executing an Office.

15. To gain a settlement by executing an office the party must reside in the parish in which he executes his office. *Rex v. Inhabitants of Woodbridge.* 457
16. A person who served the office of pinder in 1825, no previous appointment to the office being shown, gains no settlement under 3 & 4 *Will.* 3, c. 11. *Rex v. Inhabitants of Clixby.* 118
17. *Quære*, whether the office of pinder is an annual office within the meaning of that act. *Ibid.*

SEWERS-RATE.

See POOR-RATE, 2.

SHERIFF.

I. Duties of.

1. The allowance of a writ of error is sufficient to render the sheriff executing a writ of *fi. fa.*, after notice of such allowance, liable in an action of trespass, without

any writ of supersedeas being issued, and notice to the sheriff is notice to the officers executing the process. *Belshaw v. Marshall.*

Page 689

2. There appears to be no precedent for issuing any process of supersedeas upon the allowance of a writ of error. *Ibid.*
3. Under a *fi. fa.* upon a judgment founded on a warrant of attorney, the sheriff seized at eleven o'clock on the 13th of August. A commission of bankrupt issued against the debtor after eleven. Sale on a subsequent day: Held, that the seizure was a levying within 6 *Geo.* 4, c. 16, s. 81; 2dly, that more than two months had elapsed between the seizure and the issuing of the commission; 3dly, that the execution was not within s. 108. *Godson v. Sanctuary.* 52

II. Evidence in Action against.

4. Admissions by the under-sheriff, not accompanying an act done in his official character: Held, not receivable in evidence to charge the sheriff. *Snowball qui tam v. Goodriche.* 234

SHIP.

I. Owners.

1. *A.* and *B.*, joint part-owners of a ship, entrust the management to *C.*, their co-part-owner, as ship's husband. *C.* employs *D.* as his agent to receive and pay money in respect of the ship, and also for his general affairs, and *D.* opens a *ship* account and a *general* account with *C.* The ship being chartered by the East India Company earns freight, which *D.* receives upon giving receipts signed by *B.* and *C.* (the rules of the Company requiring the signature of one other part-owner, in addition to that of the ship's husband.) *D.*, who knew that *C.* was only part-owner, but

STAMP.

was never controlled by them, places the amount of freights received to the credit of *C.*, as ship-owner, in *C.*'s ship-account. *C.* dies insolvent, *A.* and *B.* cannot sue *D.* for the balance due from him on the ship's account, because there is no privity of contract between them; *D.*'s responsibility is, to the executors of *C.* *Sims and others v. Britten and another.*

Page 594

2. Part-owners of a ship are tenants in common. But persons may be jointly interested in the entirety of a ship as *joint-owners*, or in particular parts or shares as *joint-part-owners*. 594, n. (a)

SHOP.

See SETTLEMENT, 13.

SLANDER, 455.

See DEFAMATION.

SPECIAL CASE.

1. Special case cannot be turned into special verdict without leave of Court. 181, n.

SPECIAL VERDICT.

See SPECIAL CASE.

STAMP.

I. Promissory Note, or Agreement.

1. An instrument acknowledging a loan of money and promising repayment, and engaging to pay an unliquidated demand out of the interest, and to pay the principal and the remainder of the interest to the lender, his executors, administrators and assigns, is not a promissory note; and it is properly stamped with an agreement stamp. *Bolton, administratrix, v. Dugdale, executrix.* 412

II. Whether Subject-matter of Agreement be of £20 value.

2. Where upon a sale by auction

STATUTES. 817

of growing crops, *A.* purchases several lots for prices respectively under 20*l.*, but amounting in the aggregate to 38*l.*, the sales to *A.* may be proved by one unstamped memorandum, signed by *A.* and others, purporting that they agree to purchase the lots respectively set against their signatures under the terms of the conditions of sale. *Roots v. Lord Dormer.* Page 667

III. Miscellaneous.

3. It is no ground for departing from the rules of evidence, that by adhering to them the revenue may by possibility be injured. *Doe d. Hawthorn v. Mee.* 424

STATUTES.

I. Construction of.

1. A person whose legal tenancy had been determined by notice to quit, was held to be entitled to compensation for good-will under the Hungerford Market Act. *Rex v. Hungerford Market Company, in the matter of John Still.* 404
2. A tenant whose term has expired was held to be entitled to compensation for good-will, and for the chance of obtaining a renewal, under the Hungerford Market Act. *Rex v. Hungerford Market Company, in the matter of John Gosling.* 1548
3. By a private statute, reciting that a proposed railway between *S.* and *W. P.* and its branches would be of great public utility, a company was incorporated for the making of such railway in a line parallel to, and in some places within five yards of, a highway, from which line no deviation was to be made exceeding 100 yards. A subsequent act authorized the use of locomotive engines on the railway. Upon an indictment for using the engines, whereby horses were frightened and accidents occasioned on the highway, the al-

leged nuisance was found by verdict; but it was also found that the engines were of the best construction, and used with due care, and that by reason of these engines the public obtained better and cheaper coal:—Held, that such a restriction of the rights of the public was not unreasonable, and must be presumed to have been contemplated by the legislature when authorizing the use of locomotive engines without words of qualification. *Rex v. Pease*.

Page 690

4. Where an act incorporating a company directs that actions in respect of claims upon the company shall be brought against the treasurer, but that his effects shall not be taken in execution, a mandamus will issue to the directors, &c. of the company, commanding them to pay money recovered against the treasurer. *Rex v. St. Katharine's Dock Company*. 121
5. Where a company is authorized by statute to embank waste land, and to construct a road upon the embankment, and to take tolls upon the road and all ways leading out of the same, such tolls are payable by persons using a railway which crosses the road, although the payments to be made by persons using a railway is fixed by the statute by which the railway is authorized to be made. *Rome v. Shilson*. 734
6. Under an act incorporating a company for the erection of a market, and authorizing them to purchase certain scheduled hereditaments, and to give a notice to parties interested to send in their claims, and directing that in case of non-acceptance of terms offered by the company the value shall be assessed in a certain mode, the company cannot, after giving the notice, abandon the purchase. *Rex, on the prosecution of Elizabeth*

TAXATION.

Davies, v. Hungerford Market Company. Page 112

II. Statutory Process.

7. Mandamus granted for issuing of the statutory process to assess the value of premises in respect of which an incorporated company had, under a clause in their statute of incorporation, declared their option to purchase. *Davies v. Hungerford Market Company*. 112

STATUTE OF FRAUDS, 313

See AUCTION, 1.

STOCK-BROKER, 492.

See BROKER, 1.

STOPPAGE OF ROAD, 426

See APPEAL, 3, 4, 5.

SUGGESTION.

See VENUE.

SUITORS.

See 362, n.; 598, n.

SUPERSEDEAS.

See SHERIFF, 1, 2.

TABLES OF PAYMENTS AND BENEFITS, 252.

See JUSTICES, 2.

TALITER PROCESSUM EST, 270

TAXABLE ITEMS, 355.

See ATTORNEY, 10.

TAXATION.

I. Public.

1. Subject not chargeable with duties unless distinctly imposed. 96, 100

II. Of Attorney's Bill.

See ATTORNEY, 8, 9, 10, 12, 14.

TENDER.

TENANCY IN COMMON.

See SHIP, 2.

TENANT-RIGHT.

See STATUTES, 2.

TENDER.

And see PRACTICE, 4, 5, 6.

I. Amount to be tendered.

1. Separate tenders of two quarters' rent. Page 373, n. (a)

II. By whom to be made.

2. Tender of rent and expenses need not be made to the broker who distrains; if made to the landlord a subsequent detainer is wrongful. *Smith v. Goodwin and another*, 371
3. Held, that a plea of a tender of 20*l.* is supported by evidence of the tender of a larger sum, though such larger sum was tendered as the sum which the creditor was to receive, and not as the sum out of which he was to take the 20*l.* *Dean v. James*. 392

III. To whom to be made.

4. A tender made to the managing clerk of the plaintiff's attorney, who at the time disclaims authority from his master to receive the debt, is insufficient. *Bingham v. Allport*, 398

IV. Mode of paying the Money tendered into Court.

5. The defendant pleaded a tender and obtained an order to pay money into Court generally, without reference to the plea: Held, that the payment of the money under this order is an admission of the cause of action stated in the declaration, and that the plaintiff is entitled to a verdict accordingly. *Bulwer v. Horne and others*. 117

TROVER.

819

TERM OF YEARS.

I. At Common Law.

1. Interesse termini, when converted into an actual term. Page 28, 162, n.

II. Under Statute of Uses.

2. Term created under a power is carved out of the seisin to serve the uses. 177, n. 88

TIME.

See CRIMINAL INFORMATION, 1, 2, 3.

TOLL HOUSE.

See POOR-RATE, 459.

TOLLS.

See POOR-RATE, 5.—TURNPIKE, 1, 2, 4.

TORT.

See CASE, ACTION ON THE.—PLEADING, 1.—TROVER, 1.

TOWNSHIP.

See APPEAL, 2.

TREES, 730.

TRESPASS.

1. Subsequent assent to a trespass will not make the assenting party a co-trespasser unless the trespass were committed for his benefit. *Wilson v. Barker and Mitchell*. 409

TROVER.

See AMENDMENT, 4.

1. *A.* consigns goods to *B.* for sale on *A.*'s account; against which he is to draw bills to be paid out of the proceeds. *A.* negotiates the bills with *C.* The first of these bills being protested for non-acceptance, *A.* requires *B.* to deliver up to *C.* such part of the consignment as should be unsold, to be held by *C.*, on *A.*'s account, in the event of the bills being dis-

honoured. Before this direction reaches *B.*, *A.* becomes bankrupt. *C.* afterwards receives the goods from *B.*:—Held,* a tortious conversion by the goods of the assignees. *Carvalho and others, assignees of Fortunato, a bankrupt, v. Burn.* Page 700

TRUSTEE.

See SET-OFF, 2.—TURNPIKE, I.

TURNPIKE.

I. *Authority of Trustees to collect Tolls.*

1. Where a local turnpike act imposes toll on carriages passing 100 yards upon a turnpike road from *A.* to *B.*, but throws upon the county the repairs of bridges and of approaches to bridges on that line of road, such toll is incurred by a carriage passing 100 yards along the road, although part of that distance be made up of the approaches to one of the bridges repaired by the county. *Bussey v. Storey.* 639
2. Under 3 Geo. 4, c. 126, s. 32, (exempting from payment of toll carriages, &c. "which shall only cross any turnpike road, or shall not pass above 100 yards thereon,") a carriage is not exempt from toll which passes along 100 yards of a road from *A.* to *B.*, for repairing which trustees have been appointed under a local act, although a part of the 100 yards be a street which, by a subsequent act, the trustees are forbidden to repair. *Pope v. Langworthy.* 647

II. *Mortgages on Turnpike Roads.*

3. A mortgage executed by *A.*, *B.*,

* The special case having been turned into a special verdict, a writ of error was brought. The errors were argued on the 10th May, 1834, in the Exchequer Chamber, before Tindal, C. J., Lord Lyndhurst, C. B., Park, Gaselee, and Bosanquet, JJ., Bolland and Gurney, BB., when the Court took time to consider of their judgment.

USES.

C., *D.*, and *E.*, as trustees of a turnpike road under an act requiring the concurrence of five trustees, is not invalidated by shewing that *A.*, who had acted as a trustee for many years, had not been appointed under seal, as required by the local act. *Doe dem. Baggaley v. Hares.* Page 237

4. A local act, 6 Geo. 4, made the tolls of a turnpike road subject to the payment of the monies borrowed thereon. The trustees granted a mortgage of such proportion of the toll and toll gates as the money advanced bore or should bear to the whole sum due or to become due on the tolls. By a subsequent act for making a branch road, the tolls of the branch road were to be subject to the monies borrowed on the former tolls, and such moneys were to have *priority of charge and payment*: Held, per Denman, C. J., Taunton and Patteson, JJ.; dubitante Parke, J., that a subsequent mortgagee of the tolls and toll-houses of the branch road acquired the legal estate therein, and that the former mortgagees were only entitled to the *priority of payment*. *Doe d. Thompson v. Lediard.* 683
5. Held also, that such subsequent mortgagee, after a recovery by him in ejectment, would become a trustee for the former mortgagees. 683

UNDER-SHERIFF.

See EVIDENCE, 12.

USES.

I. *How raised.*

1. Can be created by deed only. 176, n.
2. Resulting use. 167, n.
3. Use upon a use. 176, n.

II. *How destroyed.*

4. A use may be waived by parol. *Ibid.*

VENUE.

III. Operation.

5. Who a *first taker* under statute of uses. Page 174, n.
6. Uses in wills, whether operating by force of the statute of uses or by force of the statute of wills. 175, n.; 176, n.

USURY.

I. Evasion of Usury Laws.

1. Bills drawn on usurious contract made available to holder for value. 193, n. (a)
2. Money legally obtainable at more than five per cent. interest by intervention of a guarantee. 700, n.

VARIANCE.

See AMENDMENT, 1, 2.

VENDOR AND PURCHASER.

I. Rights of Vendor.

1. Lien for residue of price after part delivery. 231, n. (a)
2. A vendor who takes in payment a promissory note and negotiates it, loses his lien. *Bunney v. Poyntz*. 229
3. Such lien is not revived upon the dishonour of the note, which is outstanding in the hands of an indorsee. 229

VENUE.

I. Change of Venue.

1. In felony the Court refused to allow the defendant to enter a suggestion for changing the venue, on the ground of a prejudice pervading the county. *Rex, on the Prosecution of Daubuz v. Penpraze*. 312, n.
2. Suggestion for change of venue for trial of indictment. 691, n.

VOID OR VOIDABLE.

See LICENCE, 1.

WASTE.

821

WAIVER OF FORFEITURE. 1

See EJECTMENT, 1, 2.

WARRANT, 321.

See ACTION, 5.

WARRANT OF ATTORNEY.

375

See ANNUITY, 2.

I. Where void as against the Defendant himself.

1. A rule to set aside a warrant of attorney, as given upon an illegal consideration, is in the nature of an application to set aside proceedings for irregularity, so as to entitle the party successfully resisting it to the costs of the application. *Colebrooke v. Layton*. Page 374

II. Where void as against the Creditors of the Defendant.

2. A judgment on a warrant of attorney is not within the protection of 1 Will. 4, c. 7, s. 7, and therefore is within the 108th section of 6 Geo. 4, c. 16. *Crossfield v. Stanley*. 668
3. In assumption for money had and received against the sheriff, to recover the proceeds of a sale under a fi. fa., issued upon a judgment not protected by 1 Will. 4, c. 7, s. 7, the plaintiff was held liable, where notice of an act of bankruptcy committed before the sale, and of a docket struck thereon, was given to him when the sale was nearly completed, after which he received the proceeds and handed them over to the execution creditor. 668

WASTE.

See CASE, 1, 5.

I. What shall amount to.

1. Tenant for years of a garden has no right to remove a border of box

- planted by himself. *Empson v. Soden.* Page 720
2. Enlargement of windows, opening external doors, and taking down partitions, no breach of covenant to repair and keep in repair a dwelling-house, together with all such buildings, improvements, or additions, as should be erected, set up, or made by the lessee. *Doe d. Dalton v. Jones and another.* 6

II. Waste Land.

See STATUTE, 5.

WIFE.

See BARON AND FEME.—MARRIAGE.

WILL.

And see DEVISE.

I. Construction of Devise.

1. *A.* having two separate closes in Dale, in the occupation of *B.*, devises to *C.* the close in Dale in the occupation of *B.*, *C.* cannot entitle himself to both closes, by shewing that *A.* supposed that the property occupied by *B.* consisted of one close. *Richardson v. Walton.* 561
2. Nor is this a case for election. *Ibid.*
3. The devise is void for uncertainty. *Ibid.*

II. Extrinsic Evidence.

4. A reference in a will to extrinsic

WRIT.

facts, as part of the description of the subject devised, does not, if such facts when proved raise no ambiguity, authorize the entering into evidence of other extrinsic facts as explanatory of the intentions of the testator. *Doe d. Templeman v. Martin.* Page 512

WINDOWS.

See WASTE, 2.

WITNESS.

And see EVIDENCE.

I. Competency.

1. In an action by *A.* a banker, against *B.* a customer, for the balance of his account, *C.* a former partner with *B.*, upon whose secession from the partnership, *B.* and *C.* executed mutual releases of all demands, is a competent witness to disprove an item charged by *A.* in the account, although the accounts between *B.* and *C.* are still unsettled, and although since the dissolution of the partnership, *B.*, the continuing partner, has asked his creditors for time. *Wilson v. Hirst.* 742

WRIT.

See EXECUTION.—JUSTICES.

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